

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LINDA SUSAN MULLENIX,	§	
	§	
Plaintiff,	§	
	§	
-v-	§	Civil No. 1:19-cv-1203-LY
	§	
UNIVERSITY OF TEXAS AT	§	
AUSTIN,	§	
	§	
Defendant.	§	

ORAL AND VIDEOTAPED DEPOSITION OF THOMAS O. MCGARITY

MAY 3, 2021

(Reported Remotely)

ORAL AND VIDEOTAPED DEPOSITION OF THOMAS O.

MCGARITY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 3rd day of May, 2021, from 9:08 a.m. to 6:13 p.m., before Cynthia Warren, Certified Shorthand Reporter for the State of Texas, reported by machine shorthand, from the residence of Cynthia Warren, located within the state of Texas, pursuant to the Federal Rules of Civil Procedure, the current Emergency Order Regarding the COVID-19 State of Disaster, and the provisions stated on the record.

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ALSO PRESENT:

Tamra English
Linda Mullenix

John Finley and Gavin Oram, videographers

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1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: We are on the record at
3 approximately 9:08 a.m.

4 THE REPORTER: Today's date is May 3,
5 2021. The time is approximately 9:08 a.m. This is the
6 oral and videotaped deposition of Tom McGarity, and it's
7 being conducted remotely in accordance with the current
8 Emergency Order Regarding the COVID-19 State of
9 Disaster.

10 My name is Cynthia Warren, CSR No. 4597,
11 and I am with The Legal Connection. I am administering
12 the oath and reporting the deposition remotely by
13 stenographic means from my residence within the county
14 of Williamson, state of Texas.

15 And now will counsel please state your
16 appearances for the record.

17 MR. WALSH: Colin Walsh for plaintiff.

18 MR. GIBSON: Darren Gibson for University
19 of Texas at Austin.

20 THOMAS O. MCGARITY,
21 having been first duly sworn, testified as follows:

22 MR. WALSH: Well, thank you for being here
23 this morning, Professor McGarity. Before we get started
24 I did want to ask Darren on the record a question
25 whether or not he would agree to something. We've had a

1 lot of objections over the last several depositions that
2 I've taken and what I was wondering, Mr. Gibson, is if
3 you would agree on the record to limit your objections
4 to form or privilege.

5 MR. GIBSON: Will you agree to the same
6 objection? No, I would prefer not to.

7 MR. WALSH: All right.

8 EXAMINATION

9 BY MR. WALSH:

10 Q. Okay. Professor McGarity, can you go ahead and
11 state and spell your name for the record?

12 A. My name is Thomas Owen McGarity, T-H-O-M-A-S,
13 O-W-E-N, M-C capital G, A-R-I-T-Y.

14 Q. And what is your current position, Professor
15 McGarity?

16 A. I'm a professor of law at the University of
17 Texas School of Law.

18 Q. And how long have you done that?

19 A. Been at the University of Texas?

20 Q. Yeah.

21 A. Since 1980, the fall of 1980.

22 Q. And where did you work before you came to the
23 University of Texas School of Law?

24 A. I was at the University of Kansas School of
25 Law.

1 Q. And what did you do there?

2 A. I was a professor of law at the University of
3 Kansas School of Law.

4 Q. And how long did you work at Kansas?

5 A. For three years. From 1977 -- the fall of '77
6 through the spring of 1980.

7 Q. And what about before that?

8 A. I was at the Environmental Protection Agency.

9 Q. What did you do there?

10 A. I was in the Office of General Counsel in
11 Washington, D.C.

12 Q. And how long did you do that?

13 A. For about two years.

14 Q. And before that?

15 A. I clerked for Judge William E. Doyle and that
16 was in the 10th Circuit Court of Appeals in Denver.

17 Q. And how long was that?

18 A. Just for one year.

19 Q. And before that did you work anywhere?

20 A. No. Oh, I had a brief two-, three-week -- I
21 clerked for a law firm in Denver. After taking the bar,
22 I took the bar out in Colorado, and my wife was
23 expecting so I took a job briefly for about three weeks.

24 Q. Oh, wow. All right. Well, like I said, thank
25 you so much for being here. Have you ever had your

1 deposition taken before?

2 A. Yes.

3 Q. How many times?

4 A. I would say around ten probably, somewhere in
5 that range.

6 Q. And what was the purpose of your deposition
7 being taken in those cases?

8 A. It was all in connection with expert testimony
9 I was delivering.

10 Q. Have you ever had your deposition taken as a
11 fact witness and not an expert witness?

12 A. Not that I can recall, no.

13 Q. All right. When was the last time you had your
14 deposition taken?

15 A. Oh, many years ago, probably a decade ago.
16 Probably ten years ago, something like that.

17 Q. Well, it's probably going to be a very similar
18 process to that. You're under the same oath that you'd
19 be put under as an expert witness, under the same oath
20 that you'd be put under in court.

21 Are you on any kind of medication or
22 anything else that might prevent you from understanding
23 or answering the questions that I have today?

24 A. No.

25 Q. All right. It is not an endurance contest so

1 if you ever need to take a break, feel free to go ahead
2 and ask. My only request is that if there's a pending
3 question, you answer that before we go ahead and take
4 the break.

5 A. Okay.

6 Q. Mr. Gibson is probably going to object to some
7 of my questions, hopefully not but he probably will.
8 Unless he tells you not to answer you can go ahead and
9 answer those questions.

10 A. Okay.

11 Q. Let's see. Do you have any questions for me
12 before we get started?

13 A. No.

14 Q. All right, perfect. So how did you decide to
15 go into academia?

16 A. I was an articles editor of the Texas Law
17 Review and I really enjoyed that work. I wasn't sure I
18 wanted to go into academia at that point but I thought
19 that I might. So I had the clerkship and I actually
20 started writing an article during the clerkship and
21 finished it while I was -- when I worked at EPA and then
22 started another article while I was at EPA. At that
23 point I was pretty sure I wanted to go into academia.

24 Q. And you enjoy it obviously?

25 A. I do.

1 Q. What do you like best about it?

2 A. Oh, it's hard to say best. I certainly -- I
3 certainly enjoy teaching and interacting with the
4 students, but I also greatly enjoy the research and
5 writing of it as well.

6 Q. So what do you like about interacting with
7 students and teaching?

8 A. Just the intellectual back and forth that's --
9 just to see particularly fresh laws, new students,
10 learning, picking up things, asking questions. I teach
11 Socratically, so the Socratic dialogue, just I find that
12 very, very enjoyable.

13 Q. What subjects do you teach at U.T.?

14 A. I taught torts every year for 40 years, all the
15 years I've been teaching, which is more than that,
16 probably 43 years. I teach environmental law
17 occasionally. Most years I teach environmental law I
18 would say. I teach administrative law occasionally and
19 then I teach a seminar. Most recently the seminar has
20 been on food safety law.

21 Q. So how did you decide -- how did you decide to
22 come to Texas?

23 A. It was a pretty easy decision. I was at
24 Kansas. I enjoyed teaching at Kansas. That's where I
25 got my start. It was a young faculty there and I had a

1 great -- great time teaching there, but when I got the
2 offer to come to Texas, I'm a Texas graduate, I
3 graduated from U.T., so there was a going-home aspect of
4 it. But as importantly, perhaps more importantly, my
5 parents just lived, oh, about an hour away in Gonzales,
6 Texas, and they had two grandchildren that -- up in
7 Kansas and it was a pleasure to get much closer to my
8 parents.

9 Q. So what -- who was the dean when you joined
10 Texas?

11 A. John Sutton.

12 Q. What was -- so you've been through -- how many
13 different deans have you been through at U.T.?

14 A. Well, let me see if I can recall them all.
15 Well, there was John, then I think Mark Yudof. Then I
16 think after Yudof was -- it may have been Powers. I'm
17 trying to remember the order. Then I guess we had --
18 well, then we had Larry Sager. I'm missing one in
19 there. And then Dean Farnsworth, but I've missed one.
20 So let me see if I can remember. I've got him -- I'm
21 picturing him now. For some reason I'm drawing a blank,
22 but. . .

23 Q. Don't worry about it. It sounds like it was a
24 long time ago. So how has --

25 A. If I think about it I'll let you know.

1 Q. Oh, sure. So how has the law school changed or
2 not changed under these deans?

3 A. Goodness. The law school is much smaller than
4 when I went in terms of the number of students. My
5 class had like 700 students in it. Now our classes are
6 in the -- under 250 often. So that's probably the
7 biggest change.

8 Another big change is we've added a
9 Commons Center and done a lot of work on -- the
10 buildings have changed a lot. I'm trying to think
11 of. . .

12 Q. What would you say the environment, like the
13 atmosphere at the law school, the collegiality or the
14 way people get along or treat each other, has that
15 changed over the course of your 40 years?

16 A. I think yes to some extent, particularly in the
17 Farnsworth era. Back in the old days the faculty was
18 invited to and I think to some extent expected to come
19 to coffee hour like at 9:00 and 3:00 or something like
20 that. That was in the very old days, and so there would
21 be a lot of conversation there and a fair amount of
22 collegiality. Not everyone came to those and to be
23 honest with you I didn't come to them very often.

24 So at some point that ended, that came to
25 an end. I think it may have been during the Yudof or

1 maybe Powers era. Mike Sharlot was the one that -- I
2 don't know why he was -- he escaped me. He was the
3 other dean. So it may have been during the Sharlot era,
4 and then we started -- I think during the Bill Powers
5 time started having more colloquia and things like that
6 a lot more, and that certainly increased likewise during
7 the Sharlot years and then also during the Farnsworth
8 years.

9 So there would -- by the -- before the
10 COVID there was something almost every day of the week
11 that one could attend. We've have the drawing board
12 lunches on Monday. We had the lunch. That started I
13 think with Farnsworth, just a faculty invited to lunch
14 and you go and they have a nice catered lunch for you.
15 On Wednesdays and Thursdays there's always colloquia.

16 So I tried to arrange my schedule so that
17 I had the noon hour free so I could attend these things
18 to the extent that they interested me, but I attend most
19 of the time. But -- until of course COVID and then
20 that's all -- we do have the colloquia still and we just
21 started having drawing board lunches this semester, so
22 that's happening again.

23 I would say the faculty when I first got
24 here was not as inviting as it was at Kansas, for
25 example. It may have been I felt a little intimidated

1 because I was there with people who had taught me and
2 felt like maybe I wasn't up to their intellectual
3 standards. I was worried that I wasn't maybe. So it
4 might have felt a little less collegial to me at the
5 time, but in general I think we're a collegial faculty.
6 We get along and say hello to each other in the hallways
7 and things like that.

8 Q. You said in the old days people were invited to
9 coffee and there might have been an expectation that
10 they attend these coffees. Is there the same
11 expectation that faculty attend drawing boards or
12 faculty lunches or colloquia?

13 A. There's some -- there's a bit of expectation
14 there, yeah. I mean, it's not -- it's not like you're
15 blackballed or something if you don't -- if you don't
16 come, and there are certainly faculty members that don't
17 come to any of these.

18 Q. Which faculty members don't go to any of these?

19 A. Which ones? Oh, my goodness, I couldn't tell
20 you which -- which ones. I'd hate to say because then
21 it would turn out that maybe they did come to one of
22 them. There are faculty members that are less frequent
23 attenders than others.

24 Q. Which ones have you noticed less frequently
25 attend?

1 MR. GIBSON: Objection, vague and
2 ambiguous.

3 A. Again, I hesitate to speculate because my
4 memory is not that great. I don't want to say, well,
5 here's somebody who didn't attend that does attend
6 sometimes. So I'd hesitate -- I prefer not to speculate
7 or try to name names.

8 Q. (By Mr. Walsh) Well, I guess what would be the
9 problem with naming names?

10 A. My memory.

11 Q. Well, I know, but if people aren't blackballed
12 for not going, then why does it matter if you mistakenly
13 say somebody does or does not go to these?

14 A. Oh, it matters.

15 MR. GIBSON: Objection, calls for
16 speculation.

17 A. It matters. It's part of service. It's part
18 of what the budget committee evaluates as part of
19 service is participation in the life of the law school,
20 and that's part of the life of the law school.

21 Q. (By Mr. Walsh) Okay. So are colloquia, then,
22 required to be attended as part of --

23 A. No.

24 Q. -- service?

25 A. No.

1 Q. What other kinds of service opportunities are
2 there within the life of the law school?

3 A. Well, serving on committees obviously. Being
4 available for things like the -- what do they call
5 the -- the groups of students, the societies, working
6 with the societies, working with the students, advising
7 various law school student organizations like the Texas
8 Law Review or the Thurgood Marshall Society, something
9 like that, are all a part of service to the law school.

10 Q. Now, are any of these things -- actually let me
11 rephrase that.

12 Are all of these types of service equal?

13 MR. GIBSON: Objection, vague and
14 ambiguous.

15 A. Let me think about that. No, I would say
16 they're probably not equal. I couldn't put a
17 quantitative number on it, but I think service on
18 committees, for example, is probably more important than
19 even -- probably even than regular attendance at the
20 colloquia or the drawing board, something like that, or
21 I guess it's certainly more important than advising a
22 student organization.

23 Q. (By Mr. Walsh) Okay. Well, would it be
24 possible to put these things in order, at least with the
25 ones you just named? So committee service is viewed as

1 the most important type of service at the law school?

2 A. Now, I'm talking about my own personal view
3 here, but that would be my view, that the most important
4 of the service is committee service, yeah.

5 Q. And then what would be just beneath that?

6 MR. GIBSON: Objection, vague and
7 ambiguous.

8 A. I guess I would say general participation in
9 various functions at the faculty that the faculty
10 undertakes.

11 Q. (By Mr. Walsh) That sounds like everything
12 else?

13 A. Well, no, yeah, you're right. That -- that is
14 more like everything else. So I was thinking more like
15 the colloquia and the drawing boards. And there are
16 lots of conferences, things like that that I didn't
17 mention earlier, but we have various conferences that I
18 think that we're invited to attend. We're not expected
19 to attend conferences unless of course we're part of
20 putting the conferences together.

21 Q. And what about after that?

22 A. Well, again, this is just my thinking. Others
23 may disagree, but I would say advising student
24 organizations probably is below that.

25 Q. What about alumni events?

1 A. Oh, I think that's there with probably about
2 the same level as advising student organizations. I try
3 to attend some of them because no one could attend all
4 of them, maybe the dean -- not even the dean, but I
5 think that's -- you know, when we have, for example, the
6 annual reunion and usually in April, I try to go to that
7 and I think others do. It's not -- I don't think it's
8 critical, but I think advising alumni is a good thing
9 and ought to be they're about the same level as advising
10 a student group, maybe slightly below that.

11 Q. Okay. You said that service is something
12 that's expected of tenured faculty at U.T. Law. Is it
13 just service to -- within the university or is there any
14 kind of service external to the university that would
15 count?

16 A. Oh, no, external counts as well. And I've just
17 been talking about the law school. There's service to
18 the university as well. That would be serving on
19 university committees which I think is certainly
20 something that should be counted.

21 Q. What kind of -- well, let me ask it this -- or
22 is service to the law school, service to the university
23 and service outside of the university, is that all
24 considered equal?

25 A. I think more or --

1 MR. GIBSON: Objection, vague and
2 ambiguous. Excuse me.

3 A. I think pretty much. Yeah, I think service
4 outside the law school is counted. Probably the service
5 to the law school may be slightly heavily -- more
6 heavily weighed, but again, I'm talking about my view
7 here. But I think service outside of the law school
8 certainly is important, it counts.

9 Q. (By Mr. Walsh) Now, have you communicated --
10 so you've said several times that this is your personal
11 view and that other people might disagree with how you
12 rank this. Have you communicated your personal view of
13 how these service activities stack up to --

14 A. No, nobody has ever asked me how they -- to put
15 them in ordinal fashion.

16 Q. Have you ever talked to anybody else about how
17 they view service?

18 MR. GIBSON: Objection, vague and
19 ambiguous.

20 A. In the context of budget committee meetings we
21 talk about service. I don't think I talk much about
22 service outside of budget committee meetings.

23 Q. (By Mr. Walsh) It would probably be kind of
24 strange to do it outside of a budget committee meeting I
25 would think. Well, so let's talk about that. You've

1 been on the budget committee a bunch of times. Is that
2 right?

3 A. That's true.

4 Q. Let's see. How many years in a row have you
5 been on the budget committee?

6 A. I couldn't tell you. I just don't -- I was
7 trying to think of a year when I wasn't on the budget
8 committee and it goes back sufficient years. Certainly
9 throughout the entire Farnsworth era and the Sager era I
10 was on the budget committee. I think I might have been
11 off one year or two during the Powers years, and I think
12 I was on it mostly during the Sharlot years. In fact, I
13 think I may have been the chairman the last Yudof year
14 and Sharlot asked me to stay on as chairman. I have
15 some dim recollection of that.

16 Q. So how does one get on the budget committee?

17 A. You're appointed by the dean. Except for one
18 year, Farnsworth's first year he asked the faculty to
19 put on a piece of paper the I think five people they
20 would like to see on the budget committee. I don't know
21 whether he followed that or not, but there was sort of a
22 semi-election kind of aspect to things that one year.

23 Q. And so what about under Dean Sager, was it the
24 same, appointed by the dean?

25 A. Yeah.

1 Q. And Yudof and Sharlot, they all just appointed
2 the members of the budget committee?

3 A. That's my understanding. I mean, I just got
4 requests from the dean to be on the budget committee and
5 I did. Oh, you do have a process, I might mention this,
6 that we get a memo saying what committees -- I guess in
7 the spring what committees would you like to be on. At
8 some point the first time I was on the budget --

9 Q. Did you request --

10 A. I don't think I ever put the budget committee
11 before I was on it, but once I got on it I would put the
12 budget committee because I like seeing what my
13 colleagues did and I also -- it was familiar to me.

14 Q. Would you say that there are some committees
15 that are more important than others at the law school?

16 A. Yeah.

17 Q. So what would be the most important committee
18 at the law school?

19 A. I think that there's -- it's hard to put
20 several of these committees in ranking order. I think
21 three really important committees are the budget
22 committee, the appointments committee, and the tenure --
23 promotions and tenure committee. Those are all three
24 pretty important to the faculty. I don't remember all
25 of the committees, so I don't know. I'm not going to be

1 able to put some kind of rank order like you asked me to
2 for the service, but I would put those three as sort of
3 co-equals at the top of importance.

4 Q. What makes them equally important?

5 A. The fact that they're all vital to the -- to
6 the law school and to its future.

7 Q. Okay. So how does the budget committee, how is
8 that vital to the law school's future?

9 A. Well, the budget committee performs an annual
10 evaluation of the faculty for purposes of advising the
11 dean with respect to pay raises and various promotions
12 that -- or at least with respect to chairs. I won't say
13 promotions because I think promotions and tenure does
14 the promotions part of it for tenured faculty. And you
15 asked me -- repeat the question again.

16 Q. And then there's the appointments committee and
17 the tenure committee.

18 A. I'm sorry?

19 Q. And then there's also the appointments
20 committee and the tenure committee you were just
21 talking --

22 A. Oh, why are they -- and why are they important.
23 The appointments committee because that's determining
24 the future of the law school. That's our -- they're
25 doing the job of putting before the faculty our future

1 colleagues. I think that's very important. And the
2 tenure committee because in years where we have
3 untenured faculty members they're deciding who are going
4 to be our permanent colleagues among those who at the
5 time are untenured.

6 Q. Okay. Do all of these committees meet every
7 year?

8 A. I don't know. I've been on the budget
9 committee. I've been on the -- I guess I've been on the
10 promotions and tenure committee and I think one time on
11 the appointments committee. The years I was on them
12 they met every year.

13 Q. When were you last on the tenure and promotions
14 committee?

15 A. It's been a while. More than a decade since
16 I've been on it I think. Well, maybe not. Let me
17 think. No, I'll take that back. I think -- yes, Dean
18 Farnsworth asked me to be on the tenure committee one of
19 his early years, so I take that back. It hasn't been a
20 decade -- or maybe it was appointments. No, I think it
21 was appointments he asked me to be on, that's right,
22 not -- but I think I've been on promotions and tenure
23 fairly -- maybe during his time; but if not, during the
24 Powers years.

25 Q. So you've been on the budget committee for --

1 through several different deans. How much has the
2 composition of the budget committee changed during your
3 time between let's say Dean Sager and Dean Farnsworth?

4 A. Between Sager and Farnsworth. Go back to the
5 people who -- maybe slightly more -- I think it might
6 be -- it may have been slightly larger, more members
7 during the Sager years. I know there was one year in
8 which a couple of members resigned and left just like
9 three or four of us. That may have been an early
10 Farnsworth year. I think it was the -- the composition
11 was somewhat smaller during the Farnsworth years. The
12 personnel changed from year-to-year. I think there may
13 have been more females during the Farnsworth years than
14 the Sager years, but you can check the records to see if
15 that were the case.

16 Q. Is it mostly the same folks, though, that serve
17 on the budget committee year after year?

18 A. No, I happen to be just an old foggy, I guess,
19 I've been on it so often. Steve Goode is on it very
20 frequently. I'm trying to think of others. Lynn Baker
21 goes on and off of it. She's been on it. Wendy Wagner
22 has been on it quite frequently. I'm trying to think of
23 others. But there -- there's a fair amount of turnover.
24 This past year there was a good deal of turnover so
25 it -- and sometimes people go on and go off and then

1 come back on.

2 Q. So you've been the chair of the budget
3 committee several times?

4 A. Yes.

5 Q. Were you chair of the budget committee in 2020?

6 A. 2020, yeah.

7 Q. What about 2019?

8 A. Yes, for part of the 2019.

9 Q. Why only part?

10 A. When you say -- we better get the ambiguity
11 straightened out here. In my thinking I think of the
12 years fall and spring because you start in the fall and
13 you go to the spring. So '19-'20 I was chair of the
14 budget committee. And '18-'19 I was chair of the budget
15 committee. Okay, fall of '18, spring of '19, fall of
16 '19, spring of '20.

17 Q. Oh, I think this is actually really important.
18 This is going to hopefully make everything less
19 confusing. So 2019, the academic year 2019 to 2020 you
20 were the chair of the budget committee?

21 A. Yeah, for part of that year.

22 Q. For part of that year. And is that the year to
23 determine the salaries for the 2020?

24 A. That would be the year that we determine the
25 salaries -- make recommendations for salaries for --

1 let's see, we're evaluating the year 2019, so we would
2 be making recommendations for the salaries for the fall
3 of 2020 and 2020-21 I think.

4 Q. Okay. And so now the academic year 2020 to
5 2021, are you on the budget committee?

6 A. Yes.

7 Q. Are you the chair of the budget committee?

8 A. No.

9 Q. Who is the chair?

10 A. Chair is Derek Jinks.

11 Q. Okay. So then I know that I'm beating a dead
12 horse, I just want to make sure I have it all right in
13 my head. So when I say you were on the 2019 budget
14 committee, you would be determining 2020 wages; when you
15 were on the 2018 budget committee, you were determining
16 2019 wages?

17 A. Again, I don't know what you mean by the 2019
18 budget committee. Are you talking about the 2018-19
19 budget committee?

20 Q. So 2019 -- well, how do you refer to each year
21 of the budget committee? Each year that you're on the
22 budget committee, each budget committee session, how do
23 you -- what do you call it?

24 A. I call it the -- like currently we're in the
25 2020-2021 budget committee year, for the spring of 2021

1 and we started in the fall of 2020.

2 Q. Okay.

3 A. And we're evaluating the submissions for the
4 year 2020. There is ambiguity kind of if you don't have
5 it really straight in your mind. The 2020-2021 budget
6 committee looks at the publications during -- that are
7 published during 2020. So we're making recommendations
8 for the salaries starting in the fall of 2021.

9 Q. So I'm putting Exhibit 1 in the chat, if you
10 could go ahead and open it.

11 A. Oh, it's in the chat box.

12 Q. Yeah.

13 A. There it is. I see it.

14 Q. Oh, yeah, so this is a headline 2019 to 2020
15 Guidelines For Annual Review of Faculty. So what --
16 tell me what this is.

17 A. Is this the university one or the law school
18 one? I think this is the university one, right? Yeah,
19 it is.

20 Q. Tell me what this is.

21 A. Yeah, if you scroll down a little more. Yeah,
22 go back to appraisals. I just want to -- stop. That's
23 appeals, yeah. No, these are the university guidelines,
24 yeah.

25 Q. And then we come down to here. So this is the

1 2019-2020 total compensation?

2 A. This is what people were paid in 2019-20, okay.

3 Q. I mean, that's what it looks like. Do you
4 agree?

5 A. Yeah, uh-huh.

6 Q. And so this is what you would be looking at to
7 determine what they should be paid in the fall of 2020,
8 right?

9 MR. GIBSON: Objection, misstates the
10 record.

11 A. That's for 2019-2020. So for the fall of 2020,
12 yeah, that's what we'd be looking at for the past year,
13 yeah. I think that's right.

14 Q. (By Mr. Walsh) So, I mean, do these documents
15 look familiar to you?

16 A. Uh-huh.

17 Q. [Indiscernible] these about this time last
18 year?

19 A. Uh-huh. I mean, the format is familiar, yes.
20 I'm not familiar with the numbers obviously, but the
21 format is familiar, yes.

22 Q. What is this?

23 A. That's -- we call it the scatter plot.

24 Q. And why is this created?

25 A. That was created so that we get some visible

1 look at the faculty and where they stand
2 compensation-wise with respect to one another.

3 Q. Okay. Why is that important to see?

4 A. Well, sometimes we deliberate and we sort of
5 look at this scatter plot towards the end after we've
6 deliberated over each faculty member and see when we're
7 talking about -- when the dean comes back to us with
8 suggested raises, we see whether that's where we want --
9 relative to others, that's where this person ought to be
10 positioned. So sometimes we might recommend a greater
11 raise because we think, well, so-and-so is a little
12 below where they should be we think with respect to
13 people around him or her.

14 Q. And what goes into that kind of determination?

15 A. Well, the first thing that goes into it was our
16 earlier evaluation and then we come back and we see --
17 because we're doing it just -- we go through -- at least
18 every year I've been on the budget committee we go
19 through faculty members' seriatim. Like one at a time
20 we look at -- we look at scholarship, teaching, and
21 service for each faculty member and we make an
22 evaluation, an overall evaluation. Then toward the end
23 we come back -- the dean comes back with suggested
24 raises and we look at the scatter plot and we see if
25 maybe somebody will recommend, well, no, we think this

1 person ought to have a little bit bigger raise and we
2 discuss it, and then the dean takes our advice whatever
3 to the extent that he deems appropriate.

4 Q. Okay. So you kind of got a little bit ahead of
5 me, but why don't we go into that right now. I guess
6 take me through the budget committee process.

7 MR. GIBSON: Objection, there's no
8 question on the table.

9 Q. (By Mr. Walsh) Can you please take me through
10 the budget committee process?

11 MR. GIBSON: Objection, vague and
12 ambiguous.

13 A. I can tell you -- if you mean the process of
14 how we do our evaluations? I mean, there's. . .

15 Q. (By Mr. Walsh) Yeah, so just take me through
16 like a hypothetical -- take me through a year. We can
17 pick any year you want, but take me through how it all
18 happens. So when do you find out you're on the budget
19 committee, when do you have your first meetings, how are
20 those set up, what happens at your first meeting, and
21 what happens at each meeting thereafter?

22 MR. GIBSON: Objection, compound question.

23 A. You find out you're on the budget committee in
24 the spring prior to the fall that you're going to be on
25 the budget committee when you find out all the

1 committees you're going to be on. It's usually the
2 spring, it could be early summer when the dean makes the
3 appointments. The first meeting of the budget committee
4 is usually in the fall and it's maybe one or two
5 meetings to -- if nothing unusual comes up. Just again
6 as the ordinary process would be, we do six-year
7 evaluations for the limited number, it's usually five to
8 eight, I think one-sixth of the faculty maybe, it may be
9 as many as ten.

10 We do an overall evaluation over a period
11 of six years for purposes of the university and there
12 we're applying the university criteria exclusively which
13 is -- I think it's above expectations, meets
14 expectations, below expectations, and there's one fourth
15 category which I'd have to see that -- see the six-year
16 memo to tell you. And we make recommendations to the
17 university along those lines. So that's in the fall.

18 Q. (By Mr. Walsh) How detailed are your
19 recommendations to the university?

20 A. We just rank them in one of those -- one of
21 those categories. There's a -- there's a lengthy
22 massive kind of document for each of the faculty members
23 that are in that -- being considered that year and I
24 think all that goes forward to the university.

25 Q. Okay. And does the university ever reject your

1 recommendations, or no?

2 A. I don't know.

3 Q. You don't know the results?

4 A. No, I --

5 MR. GIBSON: Objection, asked and
6 answered.

7 A. No, as a general matter we don't get back from
8 the university what they have to say, as far as I know.
9 I may be forgetting, but I don't recall having any
10 response from the university. The dean may. Of course
11 ultimately it's the dean that takes it forward to the
12 university.

13 Q. (By Mr. Walsh) Okay. So that was actually
14 going to be my next question. So you make the
15 recommendation to the dean who then passes it on?

16 A. I think that's right. Again, I'd have to look
17 at the -- there's guidelines for this, six-year
18 guidelines. I know the guidelines specify that there
19 needs to be a committee. I don't know whether the dean
20 just passes those recommendations along or the dean
21 makes the recommendations. I can't recall what the memo
22 says about that.

23 Q. All right. So then what happens after that?

24 A. Well, once we've completed that process, then
25 we're pretty much done for the semester unless something

1 comes up and things could come up. During the
2 Farnsworth era we might have a meeting in the fall that
3 he is about to make an offer to someone for a job. I
4 don't think that usually happens in the fall. I think
5 that's more frequently in the spring. But there could
6 be things like that where the dean comes to us and says
7 is this salary range sensible.

8 Q. Tell me more about that. Why would the dean
9 come to you and ask whether a salary range is sensible?

10 MR. GIBSON: Objection, calls for
11 speculation.

12 A. You have to ask the dean about that. I don't
13 recall.

14 Q. (By Mr. Walsh) Now, wait a second, Professor
15 McGarity. I mean, you're on the budget committee,
16 you've been the chair of the budget committee. The dean
17 comes to you and says, hey, is this salary range
18 acceptable and you're like you have no idea why he is
19 coming to you?

20 A. Oh, no.

21 MR. GIBSON: Objection, asked and answered
22 and calls for speculation.

23 A. I think the ultimate reason I guess -- again, I
24 don't know what he's thinking, but he does ask for us --
25 he does ask our advice when it comes to making offers to

1 other -- for lateral hires in particular.

2 Q. (By Mr. Walsh) Okay. So he'll come to you and
3 ask about salary ranges for lateral hires?

4 A. Yeah, that's what I was saying. That's. . .

5 Q. All right. So, I mean, so that would be why he
6 would come to you then. So you do know why.

7 MR. GIBSON: Objection, calls for
8 speculation and asked and answered.

9 Q. (By Mr. Walsh) Would that be correct?

10 A. That's my view of why he comes to us. I
11 don't --

12 Q. But you don't completely know and you don't
13 ask?

14 MR. GIBSON: Objection; calls for
15 speculation, compound question, asked and answered.

16 Q. (By Mr. Walsh) You can go ahead and answer.

17 A. That's why I think he comes to us is because he
18 wants our advice with respect to salary ranges.

19 Q. All right. You don't ask him why he has come
20 to you?

21 A. No.

22 Q. Does anybody else ask him?

23 MR. GIBSON: Objection, calls for
24 speculation.

25 A. Not that I can recall.

1 Q. (By Mr. Walsh) Why don't you ask?

2 A. It didn't occur to me to ask what was
3 motivating him.

4 Q. You didn't want to know why you were being
5 asked to do something?

6 A. It seemed to me like -- it was pretty clear to
7 me at least that he wanted our advice on the appropriate
8 salary ranges.

9 Q. Well, I mean, I agree, Professor McGarity, the
10 way you describe it, it does sound pretty clear and so
11 that's why I keep wondering why you're hedging your
12 answers and qualifying your answers; saying, well, I
13 think this is why, I don't know why, nobody asks my
14 perception of why he comes. I mean, that seems like a
15 weird way to answer a question when it seems pretty
16 clear to --

17 A. Well --

18 MR. GIBSON: Hold on. There's no question
19 on the table. What's the question on the table?

20 Q. (By Mr. Walsh) So, Professor McGarity, why are
21 you so unwilling to commit to why Dean Farnsworth asks
22 you about salary ranges?

23 MR. GIBSON: Objection; misstates the
24 record, calls for speculation, asked and answered.

25 A. Because I don't know what's in Dean

1 Farnsworth's mind.

2 Q. (By Mr. Walsh) How can you ever -- well, is
3 there any way to know what's in somebody else's mind?

4 MR. GIBSON: Objection, calls for
5 speculation.

6 A. Not precisely.

7 Q. (By Mr. Walsh) How would you determine what
8 somebody -- what's in somebody's mind?

9 MR. GIBSON: Objection, calls for
10 speculation.

11 A. I interpret what they say or what they do.

12 Q. (By Mr. Walsh) Okay. So you --

13 A. [Indiscernible] into tort law here, if you want
14 to -- if we want to talk about intent and how one
15 manifests intent, we could do that.

16 Q. Yeah, let's do that. How does one manifest
17 intent?

18 A. The theory --

19 MR. GIBSON: Objection; calls for a legal
20 conclusion, calls for speculation.

21 A. You look at their actions, you look at what
22 they say, you look at what they -- what they express by
23 way of desire, and you look at what a reasonable person
24 would know with substantial certainty.

25 Q. (By Mr. Walsh) What does that mean, what a

1 reasonable person would know with substantial certainty?

2 A. Well, that's for a jury to decide.

3 Q. Well, I mean, are you a reasonable person,
4 Professor McGarity?

5 A. I hope so.

6 Q. So how would you determine whether you know
7 something with a substantial certainty?

8 MR. GIBSON: Objection, calls for a legal
9 conclusion.

10 A. What do I -- what do I think?

11 Q. (By Mr. Walsh) Yeah, what would --

12 A. Ask the question again. I'm not sure I
13 understand your question.

14 Q. Well, you said one way that you determine or
15 people manifest intent is by what a reasonable person
16 would know with substantial certainty. I'm trying to
17 figure out what that means. You said that's for the
18 jury to decide, but in everyday life we can't just say
19 all right, jury, you decide now, right? So how do
20 you -- how do you get through your days?

21 MR. GIBSON: I'm sorry, is the question
22 how do you get through your days? Is that the question
23 that's on the table?

24 MR. WALSH: Is there an objection, Darren?

25 MR. GIBSON: Objection, vague and

1 ambiguous. In addition, calls for speculation.

2 Q. (By Mr. Walsh) So then what does that mean,
3 then, if it -- what does it mean to -- what does it mean
4 for a reasonable person to have substantial certainty?

5 MR. GIBSON: Objection, calls for a legal
6 conclusion. Objection, calls for speculation.

7 A. That aspect of it is an objective test that is
8 applied when we -- for the very reason that we can't
9 actually know what's going on in someone's brain.

10 Q. (By Mr. Walsh) So you just said that is an
11 objective test, so what are the factors?

12 MR. GIBSON: Objection, calls for a legal
13 conclusion.

14 A. Factors are reasonableness, reasonable person,
15 ordinary prudent person in the same or similar
16 circumstances.

17 Q. (By Mr. Walsh) Yeah, but what is an objective
18 factor to show whether somebody is reasonable?

19 MR. GIBSON: Objection, calls for a legal
20 conclusion.

21 A. We just call the reasonable person test the
22 objective test, an objective test. And you're asking me
23 how do I know that somebody is being objective?

24 Q. (By Mr. Walsh) Well, what does it mean for
25 that to be an objective test, a reasonable person test

1 is an objective test?

2 MR. GIBSON: Objection, calls for a legal
3 conclusion.

4 Q. (By Mr. Walsh) If it's objective, that means
5 anyone can apply; regardless of whether it's you, me, or
6 somebody on the other side of the world, they're able to
7 apply the test in the exact same manner. That's what
8 objective means. Do you agree?

9 MR. GIBSON: Objection, calls for a legal
10 conclusion. Objection, compound question. Objection,
11 asked and answered.

12 A. No, I wouldn't agree with that.

13 Q. (By Mr. Walsh) Well, how would you describe an
14 objective test?

15 A. There's one that one can provide to a
16 decision-maker, in my case often the jury, to determine
17 what's going on in someone's mind when you can't really
18 know.

19 Q. Well, what factors should they be looking at?

20 MR. GIBSON: Objection, calls for a legal
21 conclusion.

22 Q. (By Mr. Walsh) [Indiscernible] objectively
23 determine what's going on in somebody's mind?

24 MR. GIBSON: Objection, calls for a legal
25 conclusion. Objection, calls for speculation.

1 Objection, asked and answered.

2 A. And the question was what factors?

3 Q. (By Mr. Walsh) Yeah.

4 MR. GIBSON: Same objections.

5 A. That would depend on the circumstances.

6 Q. (By Mr. Walsh) Well, so let's use kind of a
7 silly example, the one where Dean Farnsworth comes to
8 you and asks you the proposed -- or asks whether a
9 salary range is reasonable. What objective standards
10 would a jury need to consider to determine why he did
11 that?

12 MR. GIBSON: Objection, calls for a legal
13 conclusion. Objection, calls for speculation.

14 A. First, I don't know that he asked us for what's
15 a reasonable salary range. It's more like appropriate
16 he asks. But I just don't recall his question to us
17 that precisely. But reasonable means reasonable.

18 Q. (By Mr. Walsh) Can people disagree on what's
19 reasonable?

20 A. Sure.

21 Q. Okay. If people disagree on what's reasonable,
22 does that mean somebody is right and somebody is wrong?

23 MR. GIBSON: Objection, calls for
24 speculation. Objection, vague and ambiguous.

25 A. I think there can be differing views and we

1 often say reasonable minds may differ, which I -- in my
2 view I agree with that. In my view that means that two
3 people could have different views and still be within
4 the range of reasonableness.

5 Q. (By Mr. Walsh) All right. So are there any
6 other things that Dean Farnsworth would come to the
7 budget committee about during the fall semester besides
8 lateral hires and the six-year reviews?

9 A. Yeah, one other thing possibly that could come
10 up any time during the year that's not part of our
11 regular process and that is if someone on the faculty
12 has an offer from another school and the question is do
13 we match that offer or how do we respond to that offer,
14 Dean Farnsworth would come to the budget committee for
15 advice there as well.

16 Q. What advice is he seeking?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. My impression is that he was seeking advice as
20 to appropriate range of salaries to offer the person who
21 has received the offer from another institution.

22 Q. (By Mr. Walsh) Now, when you've been on the
23 budget committee has Dean Farnsworth come to you seeking
24 that kind of advice regarding an offer for a faculty
25 member at another institution?

1 A. Yes.

2 Q. So how did you evaluate what to do or what
3 advice to give to Dean Farnsworth?

4 A. We first look at what the other institution has
5 offered --

6 Q. How do you --

7 A. -- if that's available.

8 Q. -- look at what the other institution has
9 offered?

10 A. Well, obviously the faculty member had to tell
11 the dean that and the dean tells us. We don't always
12 know.

13 Q. Is there any kind of documentary evidence
14 required?

15 A. I'm sorry?

16 Q. Is there any kind of documentary evidence
17 required? So, for example, does the faculty member have
18 to provide a written letter offer to the dean or an
19 e-mail to the dean showing that the school has offered a
20 certain amount to him or her?

21 MR. GIBSON: Objection, calls for
22 speculation.

23 A. You'd have to ask the dean that. I've not seen
24 a letter like that that the dean has showed to us.

25 Q. (By Mr. Walsh) Okay. So you find out what

1 the -- the dean tells you what the offer is and --

2 A. If he knows. Sometimes we -- I think there's
3 been the situation -- I can't say for sure that we
4 always know that number. I'm not sure that the faculty
5 member always shares that with the dean, but in the
6 case -- the most recent case that I'm thinking about
7 there was a number.

8 Q. What's the most recent case you're thinking of?

9 A. Well, there's been a couple. One was Richard
10 Albert and I think there was Cary Franklin.

11 Q. All right. So then what happens?

12 A. Then the committee deliberates. We talk it
13 over, talk about it and talk about some range that we
14 would recommend that the dean go back to the faculty
15 member with. And the dean of course takes some number
16 out of that range, right, and we don't know I think what
17 that number is.

18 Q. So what does -- how does the committee
19 deliberate on what range to recommend to the dean?

20 MR. GIBSON: Objection, vague and
21 ambiguous.

22 A. We talk about how valued the faculty member is,
23 and I think sometimes we get that scatter plot and we
24 see where that's going to put that person with respect
25 to other colleagues that might be in his or her range on

1 the scatter plot and see if that -- how far out our
2 range that's going to put this person. Because at least
3 in my thinking it may mean that if we do that to secure
4 that faculty member, then we're probably going to have
5 to in future years think about providing raises to the
6 people in that range that are equally valuable.

7 Q. Okay. So how do you determine whether these
8 people are equally valuable?

9 MR. GIBSON: Objection, vague and
10 ambiguous.

11 A. Based on the same conversations that we use
12 when we recommend the raises to the dean: scholarship,
13 service, and teaching.

14 Q. (By Mr. Walsh) Okay. And so this person -- so
15 you guys are deliberating, you look at how valuable that
16 professor is and use those same scholarship, service,
17 and teaching requirements. Is there anything else that
18 you look at?

19 A. No, other than, as I mentioned, the comparison
20 of where they are with respect to their cohorts.

21 Q. So how do you determine who's in a cohort of
22 faculty members at U.T. Law?

23 A. I think there's a couple of scatter plots. I
24 think the one is based on years out of law school or out
25 of your last degree, and the other is -- no, I think

1 it's just years out of law school and then the other one
2 is based on years in teaching. You've got the scatter
3 plots there. You could see that.

4 Q. I'm trying to share my screen here. All right.
5 So here's a scatter plot. Would this be the one for
6 years since law school?

7 A. Yeah. JD year it says there, yeah.

8 Q. Okay. Well, let's see. So this also says
9 total years teaching.

10 A. That may be the total years teaching then.

11 Q. Total years teaching and then the next one --
12 I'm sorry, this is the graduation.

13 A. Yeah. So I remembered that correctly.

14 Q. So which one of these determine -- so is it
15 like a combination of both of these charts?

16 A. Yeah, I mean, they're -- they're pretty similar
17 if you look at them.

18 Q. Yeah. So which one, though, do you use?

19 A. Well, it depends on the circumstances, depends
20 on the faculty member. We could have a faculty member
21 that graduated from law school, they spent 15 years in
22 the practice and then started teaching. If we're
23 looking at that faculty member we'd probably look at the
24 years in teaching. If we're looking at a faculty member
25 who, like me, spent a clerkship and a couple of years

1 before going into teaching, we might look at the JD,
2 whatever the years since graduation.

3 Q. Okay. And so the people that have been
4 teaching longer get higher salaries?

5 A. Not necessarily.

6 Q. They're just grouped together with the others?

7 A. Yeah.

8 Q. Okay. So like, let's say, if you look down
9 at --

10 A. They're not grouped together. As you can see
11 on the scatter plot, they're spread out by the years
12 since they've -- in this one since the years they've
13 been teaching.

14 Q. But this would be like the scatter shot that
15 you would look at to determine whether or not, let's
16 say, if somebody had another offer from another school,
17 whether you wanted to meet that, what the salary
18 increase might do --

19 A. Yes.

20 Q. -- where they're located?

21 A. Exactly.

22 Q. So is there any significance -- like is it a
23 five-year period? Is that why this is divided into five
24 years of teaching, so everybody between 30 and 35 are
25 kind of similar?

1 A. I think that's just to give us --

2 MR. GIBSON: Objection -- objection, calls
3 for speculation.

4 A. No, I think that's just to give us some sense
5 of where we are, then those lines going up so that we
6 can measure it. I don't think that they -- those five
7 years don't determine categories, no.

8 Q. (By Mr. Walsh) Okay.

9 A. Cohorts.

10 Q. So how would you -- how do you determine
11 categories based on this chart?

12 A. Well, you can see a cohort toward the end there
13 ten years out, a bunch of people there bunched up right
14 in there.

15 Q. Right here, SCM, JRF, CC, like these guys right
16 here?

17 A. Uh-huh.

18 Q. Okay. And so let's just -- hypothetically
19 speaking, if SCM came to you -- Dean Farnsworth came to
20 you regarding SCM, you would look at this chart to see,
21 well, if we gave him \$20,000 what would that do in terms
22 of these other people in the same area?

23 MR. GIBSON: Objection, calls for
24 speculation.

25 A. Yeah. Yes.

1 Q. (By Mr. Walsh) Okay. And so then how do you
2 determine whether that change is worth it?

3 MR. GIBSON: Objection, calls for
4 speculation.

5 A. It's a judgment call. The dean is asking for
6 our judgment.

7 Q. (By Mr. Walsh) And what goes into your
8 judgment?

9 MR. GIBSON: Objection, calls for
10 speculation.

11 A. The criteria I mentioned, the value of the
12 faculty member. I mean, in this instance if we're
13 talking about someone being hired away where we have a
14 good chance of losing the faculty member, so we're
15 thinking about, well, what are the costs to the
16 institution of losing this faculty member versus what
17 are the costs or the -- of retaining that faculty
18 member. It's a judgment call.

19 Q. (By Mr. Walsh) Well, what factors do you and
20 the budget committee consider in terms of making that
21 judgment call, though?

22 MR. GIBSON: Objection, asked and
23 answered. Objection, calls for speculation.

24 A. A general assessment of scholarship, teaching,
25 and service.

1 Q. (By Mr. Walsh) So here's the years since law
2 school. Do you ever look at this as well in determining
3 what to recommend?

4 A. It's there. I mean, that's always there before
5 the committee in our deliberations. Which one I look at
6 again depends on the situation. If it's somebody who's
7 been -- was out of law school a long time before
8 becoming a teacher, you might look at this chart or give
9 more weight to it, have it be a little more weighty in
10 your consideration.

11 MR. GIBSON: Colin, we've been going for
12 an hour and 15 minutes approximately. Is now a good
13 time? I know we've all had a bunch of coffee this
14 morning. Is now a good time to take a break?

15 MR. WALSH: Yes, this is actually perfect
16 because I'm looking for something. So yeah.

17 MR. GIBSON: Great.

18 THE VIDEOGRAPHER: We are off the record
19 at 10:17 a.m.

20 (Recess taken from 10:18 a.m. to
21 10:30 a.m.)

22 THE VIDEOGRAPHER: We are back on the
23 record. The time is 10:29 a.m.

24 Q. (By Mr. Walsh) Okay. So we're talking about
25 budget committee duties and we were talking about the

1 scatter shot charts and reasons that Dean Farnsworth
2 would come to the budget committee during the fall
3 semester and what advices they would seek. So you
4 mentioned two different professors that you can remember
5 Dean Farnsworth coming to the budget committee about
6 regarding offers from other institutions. You mentioned
7 Cary Franklin and Richard Albert.

8 A. Yes.

9 Q. What institution did Richard Albert get an
10 offer from?

11 A. I don't recall. I would be speculating.

12 Q. Well, go ahead and tell me what your thought
13 was.

14 MR. GIBSON: Objection, calls for
15 speculation.

16 A. I think it may have been the University of
17 Virginia.

18 Q. (By Mr. Walsh) And do you remember what the
19 number was for that?

20 A. No.

21 Q. Did the budget committee recommend giving him a
22 raise?

23 A. Yes.

24 Q. What was the amount that the budget committee
25 recommended?

1 A. I don't remember.

2 Q. Do you remember when this happened?

3 A. Yeah, it was within the last year or so, last
4 two years anyway. Probably within the last year.

5 Q. Within the last year, okay.

6 A. Or the last two years. It's got to be -- I
7 think it's probably the last two years because the last
8 year has been the COVID year, right, so we didn't meet
9 personally and I'm not sure whether we -- I think --

10 Q. I'm putting Exhibit No. 2 into the chat and I'm
11 about to share my screen. So here's what I have for
12 salaries for 2020.

13 MR. GIBSON: Colin, you haven't -- the
14 Exhibit 2 hasn't come through but it's there now. Thank
15 you. Just give it a chance to download it and look at
16 Exhibit 2, please.

17 MR. WALSH: And it should be on the screen
18 right now as well.

19 Q. (By Mr. Walsh) Do you see it?

20 A. Yes.

21 Q. All right. So here if you look at Richard
22 Albert -- well, first of all, have you ever seen this
23 before?

24 A. I don't recall it, no. But, I mean, I see
25 the -- the form I've seen before. I don't know if I've

1 seen these particular numbers.

2 Q. Now, this is a portion of a much larger
3 document regarding 2019 to 2020. And then the last four
4 columns -- no, five columns, as you can see, have to do
5 with 2020 and 2021.

6 A. Uh-huh.

7 Q. Now, you would have been the budget committee
8 chair for the year --

9 A. Yes.

10 Q. -- that determine these 2020 and 2021
11 compensations?

12 A. Yes.

13 Q. Okay. So here if you look at Richard Albert,
14 he was awarded \$43,250 listed as equity and retention.

15 MR. GIBSON: Just for the record, I'm
16 going to just object in that this document is not Bates
17 stamped and I cannot tell where the source of the
18 document or what it's a part of. So for the record it's
19 unclear as to what this document -- where it came from
20 and what it is.

21 MR. WALSH: Well, Mr. Gibson, if you
22 actually look at the document title, it's D 0037409.

23 Q. (By Mr. Walsh) All right. So, Professor
24 McGarity, we're talking about Richard Albert. Is this
25 that retention bonus that you were talking about?

1 A. It looks like it, yes.

2 Q. Is this what you recommended to Dean
3 Farnsworth?

4 A. I can't recall what we recommended.

5 Q. Can you recall whether this was in the
6 ballpark?

7 A. Not specifically. I'm not surprised to see
8 that number, but I can't tell you if it was within the
9 ballpark or not. My guess is it probably was, but
10 that's a guess.

11 Q. This just happened recently, right? You said
12 this happened within like the last year?

13 MR. GIBSON: Objection, misstates the
14 record.

15 A. Within the last year or two. I was explaining
16 before you put this up that this last year everything
17 has been done electronically, and I can't remember
18 whether this conversation happened electronically or
19 live. If it was live it would have been before last
20 year. This was within the last two years I think I --

21 Q. (By Mr. Walsh) Well, does it -- how often does
22 Dean Farnsworth come to the budget committee with offers
23 from other schools for faculty members?

24 A. Fortunately not too often.

25 Q. Okay. So Richard Albert was one of just a few

1 and he got a substantial raise, but you can't remember
2 what you recommended to Dean Farnsworth?

3 MR. GIBSON: Objection, misstates the
4 record.

5 A. I can't remember the range that we recommended
6 to Dean Farnsworth.

7 Q. (By Mr. Walsh) But you did recommend giving
8 him a retention bonus?

9 A. I wouldn't have called it a retention bonus.
10 We recommended the dean offering him a salary to -- if
11 he remained at the law school. If you want to call that
12 a retention bonus, I suppose it's just a matter of
13 nomenclature.

14 Q. And the other person you mentioned was Cary
15 Franklin?

16 A. Yes.

17 Q. When did that happen?

18 A. Again, within the last two years. Probably
19 within the last year because I think they actually did
20 leave the faculty.

21 Q. Okay. So Cary Franklin is going to UCLA --

22 A. That's correct.

23 Q. -- [indiscernible] year, correct?

24 A. That's my understanding.

25 Q. Did the budget committee recommend that she get

1 a raise?

2 A. Yes.

3 Q. What did the faculty -- or the budget committee
4 recommend?

5 A. I don't recall the number.

6 Q. Do you remember anything about the number?

7 A. I remember that our intent was to at least
8 match UCLA.

9 Q. What was UCLA?

10 A. I don't remember.

11 Q. Do you remember generally where it was?

12 A. No.

13 Q. So I guess we probably know it was more than
14 270?

15 MR. GIBSON: Objection, calls for
16 speculation.

17 A. The recommended salary for this year had she
18 stayed would have been more than that, yes.

19 Q. (By Mr. Walsh) All right. And so does that
20 help your memory at all regarding what UCLA offered?

21 A. No.

22 Q. So what factors did you consider when
23 determining what range to recommend to Dean Farnsworth
24 regarding Professor Franklin?

25 A. The ones I mentioned earlier. We were looking

1 at her value to the law school and both Richard and her
2 case that we valued them highly and that's based on
3 their scholarship, teaching, and service.

4 Q. Okay. Did you value them both the same?

5 A. No, we valued them at different times so I
6 couldn't say whether it was the same. We valued them
7 both. I could -- that's about as much as I can say.
8 Different members of the committee may have had
9 different value or different valuation.

10 Q. What is your -- what did you value Cary
11 Franklin and Richard Albert?

12 A. I valued them both very highly.

13 Q. Did you value them both the same?

14 A. You're asking me to compare the two?

15 Q. Yes.

16 A. I would have valued Cary somewhat higher than
17 Richard.

18 Q. Why is that?

19 A. I think her scholarship is a little higher
20 quality. This is me. I can't say the whole committee
21 would have done that valuation that way.

22 Q. Did you discuss this view with the committee?

23 A. The comparison did not come up before the
24 committee, so no, I didn't.

25 Q. Well, it would have happened about the same

1 time, wouldn't it?

2 MR. GIBSON: Objection, misstates the
3 record.

4 A. I don't know for sure. Within the past two
5 years, within the two-year range, yes.

6 Q. (By Mr. Walsh) And then, let's see. So then
7 you recommended it to Dean Farnsworth. Do you know
8 whether Dean Farnsworth took the recommendation
9 regarding Cary Franklin?

10 A. I do not know for a fact whether he did or he
11 didn't.

12 Q. Now, let's see. Now, earlier you had talked
13 about how you look at scatter shots and when you're
14 making determinations about what sort of salary range to
15 recommend --

16 A. Can I amend my answer to your previous
17 question?

18 Q. Sure.

19 A. When you talked about Cary and Richard, another
20 reason I would have ranked -- regarded Cary more highly
21 is her teaching over Richard's.

22 Q. What made Cary's scholarship better than
23 Richard's?

24 A. I found it to be more analytical. Richard's is
25 fairly -- his is analytical in the sense that he

1 categorizes things a lot, but her scholarship is very
2 analytical. It's very highly placed. She publishes in
3 the very best, the very top journals in the country.
4 Richard writes mostly books and chapters in books. So
5 there's a -- it's not easy to compare the scholarship,
6 but that's my general impression.

7 Teaching is easier because you can look at
8 the student teaching evaluations and get a good sense of
9 the comparison. That's why I modified the answer.
10 She's much -- the students regarded her more highly on
11 their evaluations than I think they have Richard.

12 Q. Okay. So you said that it's difficult to
13 compare the scholarship, but you are able to do it. So
14 how do you go about comparing the scholarship between,
15 say, Richard Albert and Cary Franklin?

16 A. Well, you look at Richard, in his genre he's
17 very well regarded, he's highly regarded.

18 Q. What is his genre?

19 A. His genre is comparative constitutional law.

20 Q. And how do you know that he is highly regarded?

21 A. He puts together conferences and the best
22 people in the world come to his conferences, and I've
23 spoken -- I've been to at least one of his conferences
24 and people speak highly of him.

25 Q. Well, does that matter to the committee how

1 he's regarded outside of the law school?

2 A. That's not a major consideration, no. It has
3 to do with -- probably more with the retention side of
4 things. But in terms of scholarship, we're evaluating
5 the scholarship on its merits.

6 Q. Okay. You don't look to anything outside the
7 university to determine whether something has merit?

8 A. I wouldn't go so far as to say that, no.

9 Q. Well, what would you say?

10 A. That sometimes something that is outside the
11 university might be determinative of a merit that we
12 would consider. What I'm thinking of in particular is a
13 publication, a peer-reviewed publication, then we know
14 that at least peers have regarded it as meritorious.
15 But we do do our own evaluations of it even when it's
16 published in a peer-reviewed journal. That's something
17 outside the university that would enter in, I think, the
18 consideration.

19 Q. Okay. So Richard Albert is highly considered
20 outside the university and that matters -- I mean, it
21 obviously matters for setting his salary, correct?

22 A. That has some -- some input, yeah.

23 Q. Okay.

24 A. And certainly in deciding whether to match
25 somebody else's offer.

1 Q. Okay. And Cary Franklin, how is she perceived?

2 MR. GIBSON: Objection, calls for
3 speculation.

4 A. My impression is that she's highly regarded and
5 perceived highly outside the university, outside of our
6 law school as well.

7 Q. (By Mr. Walsh) How do you know that?

8 A. I think I've spoken with people who have
9 mentioned her from other universities. I'm trying to --
10 I'm having a little bit of difficulty here on this
11 particular one because she's married to Joey Fishkin who
12 other people have talked to me about too and I don't
13 want to mix the two. But I think -- I think you often
14 talk to them -- talk about them or I hear about them
15 from people in other schools kind of in a combination.
16 I'm trying to remember other. . .

17 Q. Now, Professor Fishkin is leaving too, right?

18 A. That's my understanding.

19 Q. Was there any offer to raise Professor
20 Fishkin's salary?

21 A. I do not recall. I don't know that we talked
22 about him when we were talking about Cary.

23 Q. Well, what is your opinion? Do you think that
24 Professor Fishkin is as good as Professor Franklin or
25 Professor Albert?

1 MR. GIBSON: Objection, compound question.
2 Objection, vague and ambiguous.

3 A. You know, I would like to see the records
4 before me before I -- before I opined on that because
5 I'm just drawing on my memory here. I value Joey
6 Fishkin very highly too. He's written some very good
7 stuff. I've read his stuff or some of his publications
8 and I think they're -- it's excellent scholarship as
9 well. I don't think he has as strong teaching
10 evaluations, but I think they're fairly high when it
11 comes to teaching.

12 Q. (By Mr. Walsh) All right. So you did mention
13 that outside perception of a professor's scholarship is
14 a factor considered by the committee. So I want to go
15 through a bunch of different indicia and see if they
16 have any meaning. So would appointment as an associate
17 reporter for an American Law Institute restatement be
18 any indication of good scholarship?

19 MR. GIBSON: Objection, misstates the
20 record.

21 A. Not per se.

22 Q. (By Mr. Walsh) Why not?

23 A. Just the appointment I think is an
24 indication -- and this may be what your question was,
25 but it's an indication of they're being well regarded

1 outside the law school. It's not indication of a
2 scholarship because it's not scholarship, it's just an
3 appointment.

4 Q. Well, I guess what does it mean to be well
5 regarded outside the law school to such an extent that
6 you would be appointed as an associate reporter on an
7 American Law Institute restatement?

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. I think it means that the people at the
11 American Law Institute, which is a -- I keep using the
12 word highly regarded, but is a highly regarded
13 institution, thinks highly of the person to appoint that
14 person as an associate reporter.

15 Q. (By Mr. Walsh) Well, what do they think highly
16 of that person for?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. Well, I don't -- I'm not a member of the
20 American Law Institute and I've never been on a
21 committee that selected someone for restatement, so I'm
22 not sure what it is that they highly regarded -- would
23 have highly regarded that person for.

24 Q. (By Mr. Walsh) Well, I mean, you've been a law
25 professor for a while, you know about the American Law

1 Institute, you say that they're highly regarded. Why do
2 you regard them highly?

3 A. My impression is that they -- that there are
4 good legal minds that are there, but that's kind of
5 based on hearsay. Charles Alan Wright was the head of
6 the American Law Institute. He was a very good friend
7 of mine when he was alive, and any institution that
8 Charles Alan Wright thought highly of, I think that
9 matters to me. I have some -- I have some criticisms of
10 the American Law Institute as well. So they are highly
11 regarded probably by others maybe more so than me.

12 Q. So if the American Law Institute appoints a
13 professor as an associate reporter, would it be safe to
14 say that that means that they highly regard that
15 professor's scholarship?

16 MR. GIBSON: Objection; calls for
17 speculation, misstates the record, asked and answered.

18 A. I think it means that they highly regard that
19 person's -- I think scholarship would be part of it,
20 sure, but they may -- I think it's more they highly
21 regard that person's judgment.

22 Q. (By Mr. Walsh) And how do they -- well, I
23 mean, and so how would an institution or how would
24 anybody highly regard somebody's judgment or come to
25 highly regard somebody's judgment?

1 MR. GIBSON: Objection; vague and
2 ambiguous, calls for speculation.

3 A. I can tell you how I would.

4 Q. (By Mr. Walsh) Okay.

5 A. And it would be based on my experience with
6 seeing that person exercise their judgment.

7 Q. What about work on other American Law Institute
8 projects besides restatements, would that be any
9 indication of a professor's scholarship?

10 MR. GIBSON: Objection, calls for
11 speculation.

12 A. It would be an indication of their service for
13 sure, not necessarily scholarship.

14 Q. (By Mr. Walsh) Okay. Well, would it mean that
15 at least the American Law Institute regards that
16 scholarship highly?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. It means they would regard that person's
20 judgment highly, and scholarship I think would be part
21 of that.

22 Q. (By Mr. Walsh) What else would be part of
23 that?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. Whatever is involved in judgment. It might --
2 again, I don't know what the ALI, what criteria they use
3 for selecting people to be reporters so I really -- I'm
4 having a hard time answering that question without
5 knowing what their process is.

6 Q. (By Mr. Walsh) Do you think it could be
7 because of sartorial judgment? Do you think they value
8 that highly at the American Law Institute?

9 MR. GIBSON: Objection, calls for
10 speculation.

11 A. I couldn't tell you.

12 Q. (By Mr. Walsh) Do you think it's possible that
13 the American Law Institute appoints reporters to
14 restatements or to other projects based on how they
15 dress?

16 MR. GIBSON: Objection, calls for
17 speculation.

18 A. I really don't know. I know that Charles Alan
19 Wright dressed very well all the time. They made him
20 their president.

21 Q. (By Mr. Walsh) And that is why you respect
22 Charles Alan Wright so much?

23 MR. GIBSON: Objection.

24 A. I'll be happy to -- I have -- I did have a high
25 regard for Charles Alan Wright, but I have a lot of

1 experience -- he officed next to me. I would say that
2 his sartorial appearance had very little to do with my
3 appreciation for the judgment of Charles Alan Wright.
4 I've seen him exercise his judgment over many years and
5 that gave me a high regard for him.

6 Q. (By Mr. Walsh) What about invitations to be a
7 speaker at academic conferences, would that be an
8 indication of the quality of a professor's scholarship?

9 A. Again, the invitation to participate or to give
10 papers is an indication of service, but I do think if
11 the invitation was to present a paper, then that would
12 be an indication that that entity thought highly enough
13 of the faculty member's scholarship to want to publish
14 it.

15 Q. Okay. What about invitation to be a keynote
16 speaker at an academic conference?

17 MR. GIBSON: Objection; vague and
18 ambiguous, calls for speculation.

19 A. Yes, I think that would be indicative -- again,
20 it's certainly indicative of service. If the nature of
21 the speech was academic, like based on a previous paper
22 written or a paper that's in progress, then I think it
23 would be an indication of that entity valuing that
24 speaker's scholarship.

25 Q. (By Mr. Walsh) What about an invitation to

1 contribute a chapter to a book?

2 MR. GIBSON: Objection, calls for
3 speculation.

4 A. Yes, I think that would be an indication of
5 that -- whoever made the invitation's value of the
6 invitee's scholarship, yes.

7 Q. (By Mr. Walsh) What about an appointment to a
8 prestigious research institution?

9 MR. GIBSON: Objection; calls for
10 speculation, vague and ambiguous.

11 A. When you say prestigious research institution
12 are you talking about law schools or are you talking
13 about things like a think tank?

14 Q. (By Mr. Walsh) Well, both or either.

15 MR. GIBSON: Objection; compound question,
16 vague and ambiguous, calls for speculation.

17 A. And the invitation was to do what?

18 Q. (By Mr. Walsh) Be an appointment to a
19 prestigious institution to provide a service.

20 A. An appointment, to like join the faculty of a
21 prestigious research institution?

22 Q. Yeah, it wouldn't be faculty, but to join the
23 research institution to provide research, scholarship,
24 work.

25 MR. GIBSON: Objection, calls for

1 speculation. Objection, vague and ambiguous.

2 A. Research, just to do research with the
3 institution? Is it a university? Because I have a very
4 different view of think tanks than I do of universities.

5 Q. (By Mr. Walsh) Give me one second.

6 (Pause.)

7 Let's see. What about something like a
8 scholar-in-residence at the Rockefeller Foundation
9 Bellagio?

10 A. I don't know what a Bellagio is, but I know
11 various Rockefeller funds. But that sounds -- I mean,
12 if -- again, rephrase your question again.

13 Q. Would appointment as a scholar-in-residence at
14 the Rockefeller Foundation Bellagio Study and Conference
15 Center be an indication of how highly regarded a
16 professor's scholarship is?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. Yes, I think so, how highly regarded it is by
20 that foundation, but yes.

21 Q. (By Mr. Walsh) Are there other foundations --
22 are there any prestigious research institutions that you
23 can think of besides universities that would be
24 impressive to you?

25 MR. GIBSON: Objection, vague and

1 ambiguous.

2 A. I was going to say that's a good question, but
3 of course that's why you're asking it. And the reason I
4 say it's a good question is I've written a bunch about
5 think tanks and I -- they have all sorts of names,
6 highly regarded scholars and things like that, they call
7 them scholars. They even have chairs in places like the
8 Cato Institute and The Heritage Foundation. And I don't
9 personally regard those as anything resembling a
10 position of a research university.

11 But if you're talking about something like
12 the National Academy of Sciences, then yes, I think
13 that -- I have high regard and I think most people do
14 for the National Academy of Sciences. And there are
15 other non-university, I guess, institutions out there
16 that I think that if I was told that someone had been
17 given a research position at that institution, I would
18 think that that meant that they thought highly of that
19 person's scholarship.

20 Q. What about correspondence from like other
21 professors or judges or practicing lawyers praising a
22 professor's scholarship, would that be an indication of
23 how well regarded that scholarship is?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. Yes, it would be an indication of how whoever
2 the author of the letter was regarded that person's
3 scholarship.

4 Q. (By Mr. Walsh) What about citation to a
5 professor's work in federal or state judicial opinions?

6 MR. GIBSON: Objection, calls for
7 speculation.

8 A. Yes, it would -- that would be an indication
9 that the judge or at least the law clerk thought highly
10 of the -- what was written in the article.

11 Q. (By Mr. Walsh) Did you just say that the law
12 clerk thought very highly of it?

13 A. No. My understanding is that sometimes these
14 opinions, particularly the citations, come as much from
15 the law clerks as from the judge themselves.

16 Q. Interesting. Does that make it any less
17 binding as precedent or any less important?

18 MR. GIBSON: Objection, calls for a legal
19 conclusion.

20 Q. (By Mr. Walsh) Do you think a judge would
21 adopt a clerk's citation to scholarship that the judge
22 didn't agree with?

23 MR. GIBSON: Objection, calls for
24 speculation.

25 A. I don't know.

1 Q. (By Mr. Walsh) Well, when you were a clerk did
2 your judge ever say I don't agree with this scholarship,
3 I think this is a crappy writer, but I'm going to put it
4 in my judicial opinion?

5 A. No, never said that.

6 Q. Do you think that it's possible judges say
7 that?

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. I don't know.

11 Q. (By Mr. Walsh) What about visiting
12 appointments at T14 law schools, would that be an
13 indication of how well regarded a professor's
14 scholarship is?

15 MR. GIBSON: Objection, calls for
16 speculation.

17 A. Invitations to visit, it depends on the nature
18 of the visit. There are a couple of kinds of visits out
19 there. There are podium visits we call them that are
20 just come in and fill a need. We need somebody to teach
21 torts and would you come teach torts for this year
22 without any indication that that institution was
23 considering that faculty member for their faculty.
24 That -- a podium visit of that sort would not be an
25 indication that that institution regarded the person's

1 scholarship necessarily highly. They're looking for a
2 teacher, but --

3 Q. (By Mr. Walsh) So are you saying a T14 school
4 might hire somebody as a visiting professor even though
5 they don't respect that scholarship to teach future
6 lawyers at a T14 school?

7 A. Yeah.

8 Q. Does U.T. hire professors whose scholarship
9 they don't respect for podium visits?

10 A. I think it's possible. We certainly hire a
11 number of adjuncts who have no scholarship at all.

12 Q. Okay. So, I mean, that's different, though,
13 right? An adjunct is different than a tenured faculty
14 member visiting an institution, correct?

15 A. For just to come in and teach I don't know that
16 it is that different.

17 Q. Which professors has U.T. Law hired whose
18 scholarship U.T. Law did not respect?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. I can't tell you because I don't speak for U.T.
22 Law.

23 Q. (By Mr. Walsh) In your opinion which scholars
24 at U.T. Law -- which people has U.T. Law hired whose
25 scholarship you don't respect?

1 A. On the permanent faculty?

2 Q. For permanent faculty and for visiting
3 professorships or podium visits.

4 MR. GIBSON: Objection, compound question.

5 A. There are people on the faculty whose
6 scholarship I do not respect because there isn't any of
7 it.

8 Q. (By Mr. Walsh) Who are those people?

9 A. Again, when I say isn't any of it, I'll say
10 there's very little of it. That are currently on the
11 faculty?

12 Q. Yes.

13 A. There have been people in the past for sure.
14 People like --

15 Q. Is there anyone currently on the faculty?

16 A. Huh?

17 Q. Is there anyone currently on the faculty that
18 would meet that description?

19 A. Yes.

20 Q. Who?

21 A. Patricia Hansen.

22 Q. Anyone else?

23 A. Probably -- there's very little scholarship
24 from like Jane Cohen.

25 Q. Anyone else?

1 A. I'm trying to think. I'm just -- there's a few
2 people that have left the faculty or have retired that I
3 would put in that category, but you said who's on the
4 faculty at the moment.

5 Q. Well, here, let me ask --

6 A. Those are the two that come to mind.

7 Q. What did you say?

8 A. Those are the two that come to mind at the
9 moment.

10 Q. What about are there any faculty or any
11 professors on the faculty right now whose scholarship
12 you consider mediocre?

13 A. If you're going to ask me to name them all, I
14 don't think I can name them all.

15 Q. Well, name as many as you can think of.

16 A. Well, that depends. It depends on the year
17 really. Over several years people that have published
18 kind of mediocre scholarship have published good pieces
19 once in a while. So I hate to -- I hate to classify,
20 characterize a faculty member as well that's a mediocre
21 faculty member or that faculty member's scholarship is
22 mediocre. In any given year any particular piece of
23 scholarship, certainly there's mediocre scholarship out
24 there and my guess is I've published some myself.

25 Q. Can you go ahead and list all the faculty

1 members whose scholarship you consider mediocre?

2 A. I just told you that I can't because it would
3 depend on the particular piece of scholarship or at
4 least a particular year.

5 Q. So sitting here right now there's no faculty
6 member currently employed by U.T. Law whose scholarship
7 you would describe as mediocre overall?

8 MR. GIBSON: Objection, asked and
9 answered.

10 A. I'm saying that I can't make that assessment
11 overall.

12 Q. (By Mr. Walsh) Right. So is there a faculty
13 member whose scholarship you find mediocre currently
14 employed by U.T. Law?

15 MR. GIBSON: Objection, asked and
16 answered.

17 A. I repeat that I can't do that, just say overall
18 this person's scholarship is mediocre. Sometimes
19 there's a good work that comes out of someone who mostly
20 publishes mediocre scholarship.

21 Q. (By Mr. Walsh) Who are those professors?

22 A. That was just a hypothetical.

23 Q. Can you think of any professors who mostly
24 publish mediocre scholarship but occasionally hit it out
25 of the park?

1 A. I didn't say hit it out of the park. I said
2 publish --

3 Q. Let me ask it this way. Are there any
4 professors who mostly publish mediocre scholarship who
5 sometimes publish better than mediocre scholarship?

6 A. Yes.

7 Q. Who are they?

8 A. Again, I don't have before me the past six
9 years of scholarship for everyone.

10 Q. Would it help if I put up a list of the
11 professors at U.T. Law and we could go through each one
12 and I could ask whether or not that meets the criteria
13 of mostly publishing mediocre scholarship?

14 A. Well, if that's -- if that's what you want to
15 do we can do that.

16 Q. Would you be able to answer my questions if I
17 do that?

18 MR. GIBSON: Objection, calls for
19 speculation.

20 A. I don't know. I truly don't. I think that I
21 really couldn't say that about any particular professor
22 at any particular time. I would want to look at what
23 particular -- particular scholarship.

24 Q. (By Mr. Walsh) Okay. So it changes every
25 year. Is that right?

1 A. Sure.

2 Q. Okay. And there's nobody who you would overall
3 describe as mediocre in terms of scholarship?

4 A. I just don't make that characterization. I
5 characterize scholarship and articles as mediocre. I
6 don't characterize a person as mediocre.

7 Q. Well, what about a person's scholarship in
8 general?

9 MR. GIBSON: Objection; asked and
10 answered, calls for speculation.

11 A. Trying to think in general. I would want
12 before me something concrete, like articles. Like if I
13 had -- and this is hypothetical. If I had three
14 articles and they were all three mediocre we'll say,
15 then I would say, well, this year this person's
16 scholarship is mediocre. If I have two mediocre
17 articles and one really good article, I might not say
18 this year this scholarship is mediocre; I might say it's
19 a little better than -- it's a plus. Sometimes we -- in
20 the budget committee we talk about an article being a
21 plus. I would say, well, this is a better than mediocre
22 year for this person.

23 But to try to characterize a scholarship
24 overall over a career or something as mediocre, I'd need
25 a lot more information and a whole lot more time put

1 into it.

2 Q. (By Mr. Walsh) Okay. So does Cary Franklin --
3 does Professor Franklin write in the same area as
4 Professor Albert?

5 A. No.

6 Q. What does Cary write about?

7 A. She writes in discrimination, constitutional
8 law, that sort of thing.

9 Q. So how can you compare Professor Albert's
10 scholarship to Professor Franklin's to the extent that
11 you said you thought Professor Franklin had better
12 scholarship?

13 A. And I said that just in general, not for any
14 particular article or book. That's just -- that's my
15 impression of having read a few of her articles and read
16 a few of Richard's chapters. He doesn't write many
17 articles. I guess I won't say that, but he writes a lot
18 of chapters and he wrote a recent book.

19 Q. Do you -- do you teach in either of these
20 subjects for Professor Albert --

21 A. No.

22 Q. -- or Professor Franklin?

23 A. No.

24 Q. So how do you evaluate whether the scholarship
25 is good or not?

1 MR. GIBSON: Objection, asked and
2 answered.

3 A. I look at -- I read it, I read the article, I
4 see if there's -- what comes through there. I look at
5 is it merely just descriptive, is it just describing
6 something, is it analytical in the sense that it
7 categorizes things, maybe categorizes cases or in
8 Richard's case he's categorizing constitutions. I look
9 at the kind of analytical or evidence of analytical
10 thought being put into it by -- sometimes people use
11 economic analysis, sometimes people use various other
12 disciplines and work that into their scholarship.

13 And sometimes it's also how well it reads,
14 how well organized the article is and whether it's clear
15 that they've looked at -- when they take a position
16 they've looked at both sides, they recognize the
17 arguments of pro and con as they're looking at a
18 particular issue, and recognize the arguments on the
19 other side if they're taking a position, recognizing
20 that there are arguments on the other side and
21 addressing those arguments. So legal analysis, and it
22 can vary on the -- by genre to some extent too.

23 Q. (By Mr. Walsh) Well, if it can vary by genre,
24 how can you compare them across genres?

25 A. Well, it's not always easy, but you do the best

1 you can.

2 Q. And you do that for all of the tenured
3 professors on the budget committee, correct?

4 A. That's correct.

5 Q. So I want to go back to this chart that I just
6 had. All right. Here's a scatter shot chart. Now, is
7 this ever provided to the faculty not on the budget
8 committee?

9 A. I don't know. I've never received it in any
10 capacity other than as a member of the budget committee.

11 Q. Okay. So would it be safe to say that faculty
12 outside the budget committee do not get to see this
13 chart?

14 MR. GIBSON: Objection, calls for
15 speculation.

16 A. I don't know if somebody requested to see it
17 whether they would be allowed to see it or not.

18 Q. (By Mr. Walsh) Well, how -- I guess how would
19 a faculty member be able to correct errors on this
20 chart?

21 MR. GIBSON: Objection; calls for
22 speculation, presumes facts not in evidence.

23 A. I don't know.

24 Q. (By Mr. Walsh) Do you know whether there are
25 any errors on this chart?

1 A. Not to my knowledge.

2 Q. Well, do you agree that the faculty should have
3 the opportunity to verify that the information the
4 budget committee is using to evaluate their salaries is
5 accurate?

6 A. If the information that the budget committee is
7 using is accurate, if the information that they're using
8 to evaluate is accurate, I've never thought about that
9 question. I don't know what I think about it.

10 Q. Well, why don't you think about it right now.
11 Do you think that the faculty member should have the
12 opportunity to verify that the information the budget
13 committee uses is accurate?

14 MR. GIBSON: Objection, calls for
15 speculation.

16 A. Well, I think there's a couple of
17 considerations there. As I mentioned, I'm not sure that
18 the faculty members don't have that opportunity. But if
19 you're asking whether they should, there's a question
20 of, of course, confidentiality and the deliberations of
21 the committee itself. We want the committee members to
22 be able to honestly evaluate people so we don't make
23 budget committee meetings open to the -- to members of
24 the faculty so that they can come witness our
25 deliberations, particularly our deliberations about

1 people other than them.

2 Q. (By Mr. Walsh) Yeah, but I'm just asking about
3 the information the budget committee uses to make those
4 evaluations.

5 A. Right.

6 Q. You don't think that that is something the
7 tenured faculty should have a say in at least in terms
8 of verifying that it's correct?

9 A. Well, that's where I'm going. I'm saying to
10 the extent that that information reveals confidences,
11 then I'm not sure. This particular --

12 [Simultaneous speaking]

13 Q. [Indiscernible] just about this chart right
14 here. Is there anything on here that's confidential?

15 A. Not really, no. I think that it's. . .

16 Q. So why shouldn't the faculty member be allowed
17 to verify whether the information on this chart is
18 correct?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. Well, the members of the faculty I know can get
22 access to their -- other members' salaries, so any
23 member of the faculty could create this chart. Whether
24 they should have access to the chart, that's not my call
25 to make. I guess I could say I don't see any particular

1 reason why they shouldn't have access to that chart.

2 Q. (By Mr. Walsh) So I'm zooming in here a little
3 bit. I don't know if you're going to be able to see
4 this that well.

5 A. Yeah, I see it much better now that you've
6 zoomed in.

7 Q. So here we have LSM, which are the initials for
8 Professor Mullenix. Do you see that?

9 A. Where is it again?

10 Q. Right here where my curser is.

11 A. Oh, yeah, right there. WEF is right over it,
12 okay.

13 Q. Right. This is the total years teaching, and
14 if you go down to the bottom here what you see is it
15 lists her as, I don't know, maybe 36, 37 years of
16 teaching?

17 A. Uh-huh.

18 Q. And if you look over here you have Robert Bone
19 and DMR, which looks like in the same line. And based
20 on this chart, if you go down to the bottom it looks
21 like they have more teaching experience.

22 A. Yes.

23 Q. Okay. Do you know whether that's accurate?

24 A. I assume that it's accurate. I won't vouch for
25 it.

1 Q. Well, I mean, you use this to base decisions on
2 salary. Don't you think you should be sure if it's
3 accurate or not?

4 A. Well, I think it's accurate.

5 Q. All right. That's what I was hoping you'd say
6 because now I'd like to show you Professor Mullenix's
7 resume. So here's Professor Mullenix's resume. And if
8 you go down here, you see that she started teaching at
9 Loyola of Los Angeles Law School in 1982. And so then
10 if you do 1982 to 2019, you get 37 years. If this chart
11 was created in 2020, and I'm talking about the scatter
12 shot chart, you would get 38 years. Do you agree?

13 A. I don't have any basis for knowing whether
14 that -- the Loyola teaching is accurate. But if it's
15 accurate, that seems right.

16 Q. All right. So putting aside the fact that a
17 tenured law professor might be lying on her resume, you
18 would agree that that would be 37, 38 years?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 Q. (By Mr. Walsh) Depending on when the chart was
22 created?

23 MR. GIBSON: Same objection.

24 A. 1982 to 2020 would be 38 years.

25 Q. (By Mr. Walsh) Right. And then if you go down

1 to the bottom of her resume, just watch me scroll,
2 you'll see that she also taught elsewhere. She taught
3 at American University, George Washington, Georgetown,
4 Fordham, going back --

5 A. It says she's a fellow at Georgetown. Is that
6 where she -- I don't know it would be teaching. I'm
7 just having trouble reading it.

8 Q. The course listed is legal research and
9 writing. You don't think she taught that?

10 MR. GIBSON: Objection, calls for
11 speculation.

12 Q. (By Mr. Walsh) But then if you go down to the
13 University of Maryland, you see that she was instructor
14 of political science in 1974.

15 A. Yeah, I don't know that we -- I remember a
16 debate about this years ago, about what we take as
17 teaching, whether it's at law schools or not law
18 schools, so I'm not sure about that. I just don't
19 remember how we resolved that.

20 Q. You're the chair of the budget committee. How
21 does the budget committee determine teaching years? Is
22 it total teaching years like it says --

23 [Simultaneous speaking]

24 A. We made -- we made a decision about that years
25 ago. I think in connection with Professor Mullenix and

1 I think maybe Professor Dammann we had a similar
2 question about and we made a determination. I guess --
3 I'm pretty sure it was the committee made a
4 determination about it, but I don't remember the -- how
5 we resolved it.

6 Q. Okay. Well, let's say just for the sake of
7 argument that it is just legal experience. We all saw
8 that she started teaching in 1982, for Professor
9 Mullenix. Do you agree?

10 A. That's what the resume said. I don't think
11 that she was probably lying about it, so yeah.

12 Q. Well, I mean, so then if you go to Professor
13 Bone, and this is Professor Bone's resume, you go down
14 to where his experience is, it looks like he didn't
15 become an assistant professor of law until 1983, which
16 would have been a year after Professor Mullenix started.

17 A. Yes.

18 Q. Okay. So then if you go back to the chart.

19 A. Can you make it big again?

20 Q. Yes. You'll see that Professor Bone is listed
21 as having more teaching experience than Professor
22 Mullenix. Even if you just discount all of her
23 undergrad teaching since 19- -- since the '70s, even
24 just looking at the law school teaching, this chart is
25 inaccurate and Professor Mullenix should be over here

1 where my curser is about.

2 A. If what you're saying is accurate and we made
3 our -- I did the subtraction accurately, I suppose so.
4 I don't know. I'd have to look into -- to that in more
5 detail, but that seems right.

6 Q. Okay. So don't you think Professor Mullenix
7 should have the opportunity to have that corrected for
8 future budget committee deliberations?

9 A. Yeah, if it's wrong I think she should.

10 Q. Okay. So how does that -- how does teaching --
11 years of total teaching affect salary decisions at U.T.?

12 A. Well, very slightly. It only determines where
13 on this chart you are really.

14 Q. Well, it determines your cohort, though,
15 correct?

16 A. Yeah, to some extent that's right. But if we
17 move Linda over a couple of years, that's not going to
18 make any significant difference in terms of evaluating
19 where she stands in her cohort.

20 Q. Well, sure, but doesn't it -- I guess when
21 you're making determinations about whether or not
22 somebody should be moved up or down in their cohort,
23 right, what do you look at?

24 MR. GIBSON: Objection, misstates the
25 prior testimony.

1 A. Look at the -- this year's teaching,
2 scholarship, and service.

3 Q. (By Mr. Walsh) Okay. But you also said that
4 you do a review to determine whether or not people need
5 to be moved up or down because of dislocation due to
6 other raises, right?

7 A. Yes.

8 Q. Is that a holistic review or is that just based
9 on the previous year?

10 A. Oh, it's based on just the previous year, what
11 we have now.

12 Q. Okay. So does the budget committee ever do a
13 holistic review of faculty members?

14 A. We do a six-year review, as I mentioned, for a
15 group of faculty members every six years, but we do -- I
16 mean, we do it every year but we're looking at six
17 years' worth of scholarship, not holistic over their
18 entire careers. No, we don't do that.

19 Q. Okay. You've never done that as a faculty
20 member -- I mean on the budget committee?

21 A. Done a holistic review looking at each faculty
22 member over their entire careers?

23 Q. Right.

24 A. Yes, we've not done that.

25 Q. Well, then, so how do you determine based on

1 the previous year only whether somebody should be moved
2 up or not?

3 MR. GIBSON: Objection, misstates prior
4 testimony.

5 Q. (By Mr. Walsh) In terms of their place within
6 their cohort?

7 MR. GIBSON: Objection, misstates prior
8 testimony.

9 A. All I can say is we look at the chart and we
10 say, you know, this person probably, given this year,
11 deserves a higher raise than that. The other thing, we
12 did go into this, somebody gets an offer from another
13 school and we match that offer, so they wind up getting
14 put higher up, right. Then we start thinking about,
15 well, look at this, we need to -- we value this person
16 who is now lower than that person highly or at least as
17 highly as that person based on their scholarship,
18 teaching, and service, and we think maybe that person
19 should get a bigger raise.

20 Q. (By Mr. Walsh) Now, you said that you do that
21 evaluation in the next few years. Is that right?

22 A. What do you mean in the next --

23 Q. In the next several years you decide that this
24 person needs to be moved up?

25 MR. GIBSON: Objection, misstates prior

1 testimony.

2 A. We do it based on what we've learned this year.

3 Q. (By Mr. Walsh) Okay. Well -- okay.

4 Previously you had testified that you would look at
5 where somebody was within their cohort, within this
6 chart, and you would decide whether or not offering them
7 a higher raise, say, to keep them at U.T. Law would
8 dislocate folks so that you needed to raise the salaries
9 of the other people around that person. Is that right?

10 A. That we would -- yeah, we would face that
11 possibility if we offered this person that higher salary
12 than the one that's --

13 Q. So when would the decision to raise the other
14 people's salaries take place?

15 A. It would come in subsequent year evaluations,
16 not during the year -- the subsequent year.

17 Q. So why not do that immediately?

18 A. I think it probably has to do with budgetary
19 considerations. I don't know how -- I guess the offers
20 that somebody departing would get would be for a
21 subsequent year. So while we don't do it immediately at
22 that point and just sort of iron everything out at that
23 point, I don't know. Probably just because it would
24 take a whole lot of time and we're going to be doing it
25 or looking at it when we do that spring's evaluations.

1 Q. So doesn't that mean that some professors are
2 not being paid equally to other professors?

3 A. I don't know what you mean by equally. We're
4 not all getting the same salary, that's for sure.

5 Q. Right. But you agree that there are certain
6 faculty members who should all be kind of grouped
7 together, right?

8 MR. GIBSON: Objection, misstates prior
9 testimony.

10 A. I say the budget committee looks at cohorts,
11 people that are, according to either years in teaching
12 or years past their JD, in the same -- in the same
13 group. But we don't treat them all equally, no, in any
14 cohort.

15 Q. (By Mr. Walsh) Right. But you did say that
16 there is attention paid to where they all stand in
17 relation to those factors, right?

18 A. Yes.

19 Q. And sometimes you look at that and you say oh,
20 well, we need to move up these other professors, right?

21 A. Move up one or more.

22 Q. Right. In a subsequent year?

23 A. Yes.

24 Q. Okay. So then for that year it seems like
25 these professors are not being paid equally and the

1 university knows it?

2 MR. GIBSON: Objection, calls for
3 speculation.

4 A. They're not being paid the same, that's true.
5 They're being paid different salaries.

6 Q. (By Mr. Walsh) Right.

7 A. And they're not being paid equally.

8 Q. Okay. I guess then why move them up ever?

9 MR. GIBSON: Objection, calls for
10 speculation.

11 A. Well, when we move them up it's always based on
12 that year's performance. But when we do it at the end
13 of the process and we look at that scatter shot and we
14 see that somebody for whatever reason is sort of out of
15 line, then we say, well, in terms of scholarship,
16 teaching, and service we think this person or that
17 person ought to be up a little more. And it's a
18 judgment -- it's a judgment call based on what we learn
19 that year on scholarship, teaching, and service.

20 Q. (By Mr. Walsh) But again, it seems like
21 there's at least a year in which U.T. Law is not paying
22 these certain professors what they value those
23 professors at?

24 MR. GIBSON: Objection, misstates prior
25 testimony.

1 A. No, that's what I was saying. I think that
2 that isn't the case. When somebody comes in in the fall
3 with an offer from another school, I think that's what
4 we're talking about here, right, they come in with an
5 offer, that's going to be for the next fall, okay. So
6 in the spring -- so we may say, okay, you have this
7 range to work with or we recommend this range, Dean. He
8 makes that recommendation to Richard Albert or whoever,
9 and in the spring we'll know that and we'll take that
10 into account as we're looking at other people's salary.
11 So Richard never got that higher salary until that fall
12 when all these others are going to be getting whatever
13 salaries we recommend and the dean accepts for that
14 fall.

15 So they're all going to be evaluated
16 equivalently. It's not equally but they'll be evaluated
17 for the same time period.

18 Q. (By Mr. Walsh) What is an equity raise?

19 A. That was something we did -- I don't know that
20 we've done it recently, but there was a time after the
21 Sager years where when we looked at the -- at the
22 information like that scatter chart that we said these
23 people are out of line here for. And then I guess -- so
24 maybe I should amend my testimony somewhat. Then I
25 think we did go look back over a few years.

1 At the time we did several equity raises
2 right after the end of the Sager years when we had an
3 acting dean and maybe even a year or so into the
4 Farnsworth era. I can't say for sure about that.
5 But -- and mostly then we were looking at female faculty
6 members and adjusting their pay upward for what we
7 regarded on the budget committee as equity reasons
8 because it seemed like over the past they had not
9 received what we now think they were entitled to.

10 Q. What does that mean, they weren't receiving
11 what you think they were entitled to? How did you
12 determine what they were -- that they weren't receiving
13 that?

14 A. I don't recall all the considerations that went
15 into it at that point. It's been a while.

16 Q. And -- okay. So is it your testimony that you
17 guys have not -- that the budget committee has not
18 proposed equity raises recently?

19 MR. GIBSON: Objection, misstates prior
20 testimony.

21 A. No, I just -- I recall them, particularly with
22 respect to that time period. I think we have talked
23 about -- we may have talked about equity raises since
24 then. I think to some extent these faculty incentive
25 programs that were -- came from the university, faculty

1 development incentives. I think to some extent when we
2 were making recommendations about who should be awarded
3 or be placed into that category, equity may have been a
4 consideration. I think that the dean thought or said
5 that the university thought that equity ought to be a
6 consideration. It was mostly about retention, as I
7 recall, but I think we may have used equity as a
8 consideration there as well. So that would have been
9 more recently.

10 Q. (By Mr. Walsh) Okay. Let's see. Okay. So
11 now I want to talk about how the budget committee
12 evaluates professors for their annual review. Which is
13 the main function of the budget committee, correct?

14 A. That's correct.

15 Q. Okay. So --

16 A. Let me modify that. We have two basic
17 functions. One is to make that evaluation with respect
18 to compensation to the dean, but at the same time we are
19 performing an equally important service to the
20 university by providing an evaluation, an annual
21 evaluation, to the university.

22 Q. Okay. Now, the university evaluation is just a
23 number rating, right, 1, 2, or 3?

24 A. 4.

25 Q. Or 4. What do those correspond to?

1 A. I was trying to -- if you got that memo, that
2 would remind me. But a 1 is above expectations, 2 is
3 meets expectations, 3 is below expectations. And 4, I
4 can't remember the name of it but it's not performing
5 adequately or something along those lines.

6 Q. And in your time on the budget committee have
7 you ever rated anybody a 1, or exceeds expectations?

8 A. No, never done that.

9 Q. Why is that?

10 A. I think when this was -- first came down from
11 the university, I think it was in -- really it came down
12 from the legislature. And so when it came down from the
13 university we thought about it, said, well, we have high
14 expectations for all of the faculty; if we get into
15 rating somebody as above expectations, we're going to
16 have a whole lot of complaints from people who just met
17 expectations that weren't above expectations. And so
18 our thinking is that we'll just leave it at more of
19 pass-fail basis, if you want to call it that. But we'll
20 see if people meet expectations.

21 And what we're more concerned with is
22 their below expectations or below that even where
23 improvement is needed, where I think our focus is more
24 on the need for improvement than on rewarding somebody
25 by calling them above expectations and then inviting

1 complaints from faculty members who weren't evaluated
2 above expectations.

3 Q. Okay. And the committee rates tenured faculty
4 with a different system, not with a number system,
5 correct?

6 A. Yeah, that's correct. In terms of advising the
7 dean?

8 Q. Yeah.

9 A. For salaries? Yes.

10 Q. Okay. How does that work?

11 A. Well, in recent years it's been -- we have
12 something we call -- the dean will come in with kind of
13 baseline raises. And that, again, varies on where on
14 the chart you are in terms of what that baseline raise
15 might be, and that of course depends on whether there's
16 going to be raises available to the law school, and most
17 years there are.

18 So we have this sort of nomenclature that
19 we've used for several years. We look at the overall
20 scholarship, teaching, and service and say, well, is
21 this baseline, is this person performing about where
22 they deserve the baseline raise for their cohort and/or
23 should it be above baseline or below baseline. We've
24 even graded -- as a further gradation we talk about,
25 well, baseline plus or baseline minus, baseline plus

1 being between baseline and above baseline and baseline
2 minus between baseline and below baseline. And so we
3 use that nomenclature these days.

4 Q. In terms of setting the baseline, you said that
5 it varies depending on where somebody is at U.T. Law.
6 Is that what this chart is here? Or I guess it's
7 divided --

8 A. I think it -- I think that chart roughly gets
9 at it, yeah.

10 Q. Okay. So it's based on like how many years of
11 teaching you've been doing in terms of like where the
12 baseline is, or is it based on amount -- or is it based
13 on salary amount?

14 A. No, no, it's based on where you are in teaching
15 or in -- I don't remember whether it's teaching or years
16 out or some combination of the two. But the dean does
17 that.

18 Q. Okay. Now, do you know what the raises -- the
19 baseline raises are going to be before you recommend
20 somebody as baseline, baseline above or below?

21 A. No, generally not, because those don't come in
22 from the university until like May and we're pretty much
23 done with our work by the end of May or by the beginning
24 of May.

25 Q. You said there's different baselines. Does the

1 cohort for each different baseline change every year or
2 is it constant? I guess maybe that was a terrible
3 question. Let me sort of put it this way. Are they the
4 same -- let's say that there's like three or four
5 different baselines. Are the same professors in each
6 baseline category every year or is there movement?

7 A. No, there's movement I think. As you get
8 further out, then you're in a different baseline
9 category.

10 Q. Well, so do you know who's within each baseline
11 cohort when you're recommending a baseline?

12 A. When we come in with baseline, baseline plus,
13 baseline minus, no, I don't think we know. We know when
14 the -- at one point we probably approved the dean's
15 allocation of who was in what cohort or area, but I
16 don't think we do that every year. I know we haven't
17 done it this year.

18 Q. Now, you said the dean comes back with
19 particular dollar amounts, the baseline raises. Is that
20 right?

21 A. That's right.

22 Q. Okay. So the budget committee does not
23 recommend particular dollar amounts?

24 MR. GIBSON: Objection, misstates the
25 record.

1 A. No. At that point when he comes in with
2 these \$4,000 is baseline for this group, 3,000 for this
3 group, 2,000 for this group, we don't know when we're
4 making those recommendations where -- where he's going
5 to wind up with his salaries, no.

6 Q. (By Mr. Walsh) But you are told eventually
7 what baseline is, what baseline -- or below baseline and
8 what above baseline corresponds to in dollar amounts?

9 A. Yeah, we do get -- finally we have a meeting
10 where we sit down with actual dollar amounts for
11 everyone other than the members of the committee and
12 we -- and that's where we look at that and we look at
13 the scatter chart and we make any adjustments or
14 recommendations for adjustments that we think we would
15 like to recommend.

16 Q. Now, you said that you would have particular
17 budget meetings for -- or you would have meetings where
18 you would evaluate specific professors' background,
19 correct?

20 A. Yes.

21 Q. Tell me about how those meetings take place and
22 what happens there.

23 MR. GIBSON: Objection, vague and
24 ambiguous.

25 A. Well, they typically are two hours, maybe three

1 hours, and the chairman circulates a list of these are
2 the people we're going to take up this meeting and we
3 may get to all of them, we may not, but here's the list.
4 And we proceed seriatim down the list.

5 Q. (By Mr. Walsh) Well, so when you first call
6 the meeting, does the chair speak, does Dean Farnsworth
7 attend these meetings?

8 A. Oh, yes. He's pretty much there all the time.
9 Once --

10 Q. Does he --

11 [Simultaneous speaking]

12 A. -- in a while he has to leave --

13 Q. -- [indiscernible] introductory remarks?

14 A. I'm sorry?

15 Q. Does Dean Farnsworth make any introductory
16 remarks?

17 A. When I was chairman I always invited him to.
18 He would sometimes, most of the time not when I was the
19 chairman of the committee, and so I was the one that ran
20 the meeting.

21 Q. You said he was there all the time?

22 A. Yes, it's important that the dean be there to
23 hear our deliberations. Sometimes he's had to absent
24 himself because some emergency comes up or something,
25 but no, the effort is made. I don't schedule a meeting

1 if the dean can't be there. In fact, again, I'm talking
2 in the past tense here when I was the chairman, but I
3 would deliberate with his assistant who ran his calendar
4 and we would see the times that he was available and
5 that's the times we'd offer to the faculty members on
6 the committee.

7 Q. Okay. Does Dean Farnsworth ever offer his
8 opinion on the professors that are being discussed?

9 A. Very rarely.

10 Q. What professors has he offered opinions on?

11 A. I can't remember one.

12 Q. You said very rarely which indicates that he's
13 done it, right?

14 A. Well, that's -- again, that's me being cautious
15 because I don't ever say never because then somebody
16 will say, well, you did it this time. But if it
17 happens, it happens fairly rarely, very rarely, as we're
18 doing our deliberations. Now, he of course talks about
19 specific professors when he asks us to advise him with
20 respect to some offer that's being made from some other
21 school or something. That happens, but in our -- you're
22 asking me about the general meetings. In the general
23 meetings the dean is usually pretty quiet and he takes
24 notes and the chairman takes notes.

25 Q. You said once again he's usually pretty quiet

1 indicating that he does contribute. Who has he talked
2 about?

3 MR. GIBSON: Objection, misstates the
4 record.

5 A. Just individual people that he's talked about?

6 Q. (By Mr. Walsh) Yes, please.

7 A. Again, during our deliberations, not -- you
8 mean just in any meeting of a general meeting?

9 Q. Well, I'm asking just about deliberations, but
10 then my very next question is going to be just in
11 general meetings.

12 MR. GIBSON: Objection, compound question.

13 MR. WALSH: No, I was just foreshadowing,
14 Darren.

15 A. All right, that's fine. I'm just trying to
16 recall. Once in a while he fills us in with information
17 that we're unaware of. I'm thinking, for example, David
18 Adelman, his wife has some position somewhere like at
19 the law school -- I mean at the LBJ School and that's
20 something that the law school has contributed to and so
21 we are to consider that. I just remembered that one.

22 I think there's something with Michael
23 Sturley perhaps as well and I'm not sure about that.
24 But once in a while he fills us in with information that
25 we're unaware of or that he deems us to be unaware of.

1 I don't know, I was unaware of. He told the committee
2 about this lawsuit, for example.

3 Q. (By Mr. Walsh) What did he say about this
4 lawsuit?

5 A. That it -- that it existed but that is about
6 it.

7 Q. Did he say anything else about it?

8 A. Not that I can recall.

9 Q. Why did he tell the committee or why do you
10 think he told the committee about this lawsuit?

11 MR. GIBSON: Objection, calls for
12 speculation.

13 A. I think he just wanted us to be informed. I do
14 recall something he said. He said, And this should not
15 affect your deliberations at all.

16 Q. (By Mr. Walsh) Did the committee discuss the
17 lawsuit?

18 A. No.

19 Q. So he just came there and he said there's a
20 lawsuit and that was the last time it was mentioned?

21 MR. GIBSON: Objection, misstates prior
22 testimony.

23 Q. (By Mr. Walsh) Is that correct?

24 A. No, he said that we've been -- that we're
25 supposed to preserve our records and not be throwing

1 away things.

2 Q. Did you preserve your records?

3 A. Yes.

4 Q. Why did he need to tell you to preserve your
5 records?

6 MR. GIBSON: Objection, calls for
7 speculation.

8 A. I don't know why he felt like he needed to tell
9 me to do that.

10 Q. (By Mr. Walsh) Does the budget committee
11 normally destroy its records after it meets?

12 A. Some records are destroyed, yeah.

13 Q. Which records?

14 A. I think like the -- well, I don't know. He
15 distributes things to the committee or sometimes the
16 chair does. No, mostly from the -- the dean does. I
17 think it's his recommended salary raises, that when it
18 comes in toward the end and we look at them and then he
19 asks us to give them back because those are preliminary.
20 And then I think we may have another meeting where he
21 gives us the final ones, so I think those may get
22 destroyed. I don't know what happens to them. Well, we
23 turn them back in. That's about it, though. I mean,
24 the big binders we get, that's all turned back in. I
25 don't know whether they get destroyed or preserved or

1 whatever. Once I got notice about this lawsuit I saved
2 everything.

3 Q. Did Dean Farnsworth say why he wants you to
4 turn back in his proposed raises?

5 A. No, I don't think so.

6 Q. Why do you think he asks for you to turn those
7 sheets of paper back in?

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. Again, we're right back to that why do I think
11 he thinks something. I think that since they are not
12 the final determination, that they're pretty much
13 irrelevant and I guess he -- he wants it to remain
14 confidential as part of the committee's deliberations.

15 Q. (By Mr. Walsh) Does Dean Farnsworth during
16 these deliberations ever express his opinion of the
17 professor being discussed?

18 MR. GIBSON: Objection, asked and
19 answered.

20 A. As I said, very rarely.

21 Q. (By Mr. Walsh) Can you think of anyone
22 besides -- well, yeah, besides Adelman and Sturley?

23 A. And that wasn't his opinion, so I want to
24 correct the record there.

25 Q. Oh, no, excellent point. Let me ask you then

1 this. Who has he expressed an opinion on?

2 MR. GIBSON: Objection, vague and
3 ambiguous.

4 A. I guess I can think of maybe -- I'm thinking an
5 opinion with respect to scholarship, service or -- you
6 know, I'm trying to think.

7 Q. (By Mr. Walsh) Yeah, we can do that.

8 A. I think Susan Klein.

9 Q. And what did he say?

10 A. I'm trying to remember. We had a discussion
11 about her teaching, called a special meeting at the
12 beginning of last year. I don't know if it was
13 [indiscernible]. She had a bad experience and he was
14 asking our advice as to whether he should remove her
15 from the course that she was teaching.

16 Q. And what was his opinion?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. My impression was that that's what he was
20 considering doing, but he wanted to hear what we thought
21 before he did it.

22 Q. (By Mr. Walsh) And what was the opinion of the
23 budget committee?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. Of those members that were there, I think it
2 was -- this was in the -- of the people that were there
3 in the room, I'm trying to remember. I don't think the
4 whole committee was able to make it because it was an
5 emergency meeting. I think there was disagreement and I
6 don't think it was resolved. I don't think the
7 committee -- I think we just each expressed our view and
8 left it at that.

9 Q. (By Mr. Walsh) What was your view?

10 A. My view was that he should remove her.

11 Q. And why was that?

12 A. Well, he actually played a tape of the class
13 that had been recorded. It didn't seem --

14 Q. And what happened?

15 A. I can't remember all the details of it. It
16 seemed unprofessional.

17 Q. Any other professors about whom Dean Farnsworth
18 has expressed an opinion?

19 A. Yeah, now that I think about it, when we talk
20 about service, often the dean is the one in the best
21 position to know about service presented -- or I'm just
22 thinking of one example. John Dzienkowski serves on the
23 appointments committee and the dean told us that John's
24 service was good, I don't know the precise words he
25 used, but he flies all over the country helping with the

1 appointments committee. And that's something we
2 probably wouldn't know, but I think it was an opinion of
3 John when he said that. So it would be occasions like
4 that where he, again, is filling in the committee on
5 something that we might otherwise not know about the
6 faculty member.

7 Q. Anyone else?

8 A. I remember he was very praiseworthy of Steve
9 Goode the year that Steve served on the university
10 committee that dealt with whether we're going to have
11 guns on campus or how we were going to deal with that.
12 These are just discussions now I'm just drawing on my
13 memory.

14 Q. When was that?

15 A. That was probably about three or four years
16 ago, whenever that committee was meeting.

17 Q. Anyone else?

18 A. I'm just thinking of things -- I'm just trying
19 to -- there's probably -- there probably have been more
20 than that, but I'm just not immediately calling them to
21 mind. Let me just think again.

22 Q. Do --

23 A. I'll tell you another thing that -- where he
24 might chime in. Mostly this is Bobby Chesney, who's the
25 associate dean, would make this kind of comment, but

1 when we talk about a teacher who teaches a lot of
2 students and would be hard to replace -- now, that's
3 mostly Bobby, though, that makes those kind of
4 assessments, not so much the dean. So -- but it may be
5 that the dean once in a while would say yeah, I agree
6 with Bobby that this person would be hard to replace.

7 Q. Has Dean Farnsworth ever expressed an opinion
8 about Professor Mullenix during budget committee
9 deliberations?

10 A. Not that I can recall.

11 Q. Has Dean Farnsworth ever expressed an opinion
12 about Professor Bone during deliberations?

13 A. Well, Professor Bone is on the committee and he
14 may have, in the kind of banter that goes on, have said
15 something about him, but I don't recall any particular
16 instance of it, no.

17 Q. And what about Professor Westbrook?

18 A. Not that I can recall.

19 Q. What about Professor Rabban?

20 A. No, not that I can recall.

21 Q. What about Professor Levinson?

22 A. I think at one point with respect to Sandy he
23 explained, and he may have done this more than once,
24 Sandy's deal with Harvard. So he may have actually
25 mentioned Sandy specifically in that connection in

1 explaining the nature of that arrangement that Sandy has
2 with Harvard, which is still unclear in my mind. I've
3 never been real clear about that.

4 Q. Anything else?

5 A. No, not that I can. . .

6 Q. What about Professor Hu -- or Hu
7 [pronunciation]?

8 A. A lot of this is based on my most recent
9 recollections. We've just been through a bunch of these
10 folks and I don't recall him saying anything about
11 Professor Hu either.

12 Q. So let me -- because I'm noticing a pattern
13 here, let me go ahead and ask. What about have you ever
14 heard Dean Farnsworth express an opinion about
15 Professors Powe, Peroni, Forbath, Steiker, Silver, or
16 Wickelgren?

17 MR. GIBSON: Objection, compound question.

18 A. Run through those again. I'm trying to be as
19 perfectly honest as I can here.

20 Q. (By Mr. Walsh) Professor Powe -- I'm sorry,
21 Powe?

22 A. Powe?

23 Q. I'm sorry, Professor Powe.

24 A. He mentioned -- I think this is in connection
25 with a budget committee meeting. I know he communicated

1 this to me. I can't absolutely swear that it was in a
2 budget committee meeting, but I heard him say that he
3 had arranged -- because Scott just hadn't been
4 publishing much and that was a concern to the committee
5 and the dean told us he had arranged to -- with Scott,
6 he said I'll bring in a bunch of professors, however
7 many you want to come in to talk about your idea for a
8 book about the Texas constitution, that so many lawsuits
9 involving the United States constitution originated in
10 Texas. Because I think Dean Farnsworth -- again, I
11 can't know what's going on in his head, but I got the
12 impression that he wanted to get Scott back active
13 again.

14 And so he did that, he brought in three or
15 four law professors to talk over this idea. And he told
16 us that Scott was -- had agreed and he was working on a
17 book. So I do remember him talking about Scott.

18 Q. What about Professor Peroni?

19 A. No, I can't recall anything with respect to --
20 anything particular the dean said about -- regarding --

21 Q. This arrangement that Dean Farnsworth made with
22 Professor Powe, has he done that for any other
23 professors?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. I don't know. I can tell you that he offered
2 to do it for me if I wanted to and I haven't done it,
3 but I think he would probably offer to do that for any
4 faculty member that -- if it would get them stimulated
5 and think about writing a book.

6 Q. (By Mr. Walsh) So how would -- did he come up
7 to you with that idea or did you go to Dean Farnsworth
8 with that idea?

9 A. I had a meeting with -- this isn't anything to
10 do with the budget committee meeting, but I had a
11 meeting with Dean Farnsworth over breakfast one time
12 where we were talking about what my -- I don't remember
13 all we were talking about, but I told him about this
14 book that I had in mind, it's actually the one I'm
15 working on right now, and said if you want me to bring
16 in some folks to talk about the book, if that would help
17 you get started with it or get some ideas about it I can
18 do that. And I didn't take him up on it, but he did
19 make that offer.

20 Q. And has he told the committee or told you about
21 any other professors he's made that offer to?

22 A. That's what I can't remember, whether he's -- I
23 have this -- well, that's kind of a -- I have an
24 impression that he -- well, but he's never told me
25 specifically that he has. I wouldn't be surprised if he

1 hadn't. I mean, it wouldn't surprise me to know that he
2 hadn't done -- made similar overtures to people.

3 Q. What about Professor Forbath, has Dean
4 Farnsworth ever expressed an opinion to you or the
5 budget committee about this --

6 A. Yeah. Yeah, with respect to Dean Forbath or
7 Associate Dean Forbath, when we evaluate his service, of
8 course, part of his service is that he's the associate
9 dean for research and the dean will give us his
10 impression of what Willie has been doing with respect
11 to -- and here's where we have nontenured faculty
12 members. One of Willie's responsibilities is to work
13 with those nontenured faculty members to make sure that
14 they're -- they feel comfortable, they're getting all
15 the support they need for their research. So the dean
16 will report to us on his impression of how Willie's been
17 performing in that capacity.

18 Q. And what is the dean's impression of how
19 Professor Forbath has been performing in that capacity?

20 MR. GIBSON: Objection, calls for
21 speculation.

22 A. Let's see, there was a couple of years where we
23 didn't have untenured faculty members, but I guess
24 generally my recollection is that it's been favorable,
25 that Willie has done a good job.

1 Q. (By Mr. Walsh) What about Professor Steiker?

2 A. No, not anything that I can recall.

3 Q. What about Professor Silver?

4 A. No, not anything I can recall.

5 Q. What about Professor Wickelgren?

6 A. No, that I can recall.

7 THE WITNESS: I think I'm about ready for
8 another break.

9 MR. WALSH: I was just going to suggest
10 why don't we go off the record.

11 MR. GIBSON: Sounds great. One hour for
12 lunch?

13 MR. WALSH: Yeah, let's do one hour for
14 lunch, 1:17.

15 THE VIDEOGRAPHER: We are off the record
16 at 12:17 p.m.

17 (Recess taken from 12:18 p.m. to
18 1:20 p.m.)

19 THE VIDEOGRAPHER: We are back on the
20 record. The time is 1:20 p.m.

21 Q. (By Mr. Walsh) All right. We're back after
22 lunch. Before lunch we had been talking about the
23 budget committee process and whether or not Dean
24 Farnsworth had mentioned anything specific about a
25 number of different tenured faculty. So that was during

1 deliberations. So now I want to ask, the people that we
2 talked about was Bone, McGarity, Westbrook, Rabban,
3 Levinson, Hu, Powe, Peroni, Forbath, Steiker, Silver,
4 and Wickelgren. Is there anyone besides those that Dean
5 Farnsworth has mentioned during deliberations of the
6 budget committee?

7 MR. GIBSON: Objection, misstates the
8 testimony.

9 A. Let me think. He lets us know when somebody
10 has entered into a retirement agreement. So to that
11 extent I'm trying to think of who that might have been.
12 I think there's one with Lynn Blais, for example, and he
13 would tell us that that had happened.

14 Q. (By Mr. Walsh) Why would the budget committee
15 need to know whether somebody has entered into a
16 retirement agreement?

17 A. Well, we don't really need to evaluate their --
18 I'm trying to think of whether we actually do the
19 full-scale evaluation or not on them. I think that's
20 the reason, that we don't need to do the full evaluation
21 because they are -- they will be retiring or are
22 retiring.

23 Q. Does that mean somebody who is retiring just
24 the next year or would it be somebody who has like a
25 five-year phased retirement?

1 MR. GIBSON: Objection, calls for
2 speculation.

3 A. I'm not sure whether he mentions the phased
4 retirements or not. It seems to me like it was just --
5 that we won't need to consider this person because
6 they -- there's an agreement as to what their pay is
7 going to be.

8 Q. (By Mr. Walsh) An agreement with Dean
9 Farnsworth?

10 A. I guess. I'm not sure.

11 Q. Are there any other circumstances under which
12 the budget committee does not evaluate someone's
13 performance?

14 A. No, we don't evaluate the librarian, Barbara
15 Bintliff.

16 Q. Any other circumstances?

17 A. Other than that they're leaving the faculty,
18 they're going to some other faculty, I can't think of
19 anything.

20 Q. Okay. What about faculty members who have the
21 faculty investment initiative funding?

22 MR. GIBSON: I'm sorry, what's the
23 question? There's no question.

24 MR. WALSH: There was a question, Darren.
25 He was about to answer until you stopped him.

1 MR. GIBSON: The question was what about
2 the faculty investment initiative. If that's the
3 question, objection, vague and ambiguous.

4 Q. (By Mr. Walsh) You can go ahead, Professor
5 McGarity. You know what I was talking about, right?

6 A. You're wondering if --

7 MR. GIBSON: Objection, calls for
8 speculation.

9 A. I think you asked me about do we -- are there
10 situations which we don't evaluate someone and you
11 said -- and I take it the question is do we evaluate
12 people who are in the faculty investment initiative, and
13 the answer is yes.

14 Q. (By Mr. Walsh) Does that affect their pay
15 raises?

16 A. No, because those are determined by the --
17 whatever the initiative provided for.

18 Q. Okay. Do you provide ratings for the people
19 who receive funds under the faculty investment
20 initiative?

21 A. Yes.

22 Q. Why provide a rating if it doesn't affect their
23 raise?

24 A. Well, there are other -- one, there's other
25 reasons for keeping abreast of people's scholarship --

1 scholarship, service, and teaching.

2 Q. What are the other reasons?

3 A. The university needs the annual evaluation, and
4 there will be a six-year evaluation so it's nice to have
5 a running five-year measure as we do the six-year
6 evaluations.

7 Q. Any other reason?

8 A. I'm trying to think. No, I think that's
9 basically it.

10 Q. Okay. So for the purposes of budget committee
11 deliberations, in 2020 what were the cohorts of
12 professors?

13 MR. GIBSON: Objection, vague and
14 ambiguous.

15 A. For what purpose are we talking about?

16 Q. (By Mr. Walsh) Determining salary or raises.
17 And of course I'm talking about the baseline
18 determination.

19 A. I -- I don't recall. I couldn't tell you.

20 Q. Well, let me ask it this way. Would professors
21 Bone, Westbrook, Rabban, and McGarity all be in the same
22 cohort?

23 A. Certainly McGarity, Rabban, and Westbrook I
24 think would be in the same category. I'm not sure what
25 side of the whatever line gets drawn there Bone would be

1 on, but perhaps.

2 Q. Well, what does that mean? So which one would
3 McGarity, Westbrook, and Rabban be in? Would that be
4 the top cohort?

5 A. We would probably be in that last category that
6 gets the lowest presumptive raises.

7 Q. Lowest presumptive raises. How many different
8 categories are there?

9 A. I -- I can't recall.

10 Q. Well, how about -- you're on the budget
11 committee this year, right?

12 A. Yes.

13 Q. When was your last budget committee meeting?

14 A. Last Friday.

15 Q. So three days ago?

16 A. Yeah, three days ago.

17 Q. Did you evaluate any professors during that
18 meeting?

19 A. Yes.

20 Q. And do you know what cohort those professors
21 were in in determining --

22 A. No.

23 Q. No? Did you make any baseline determinations
24 for them?

25 A. Yes, we made the baseline, above baseline,

1 baseline plus. We made those determinations, yes.

2 Q. Okay. But you don't know where they're going
3 to fall in the salary --

4 A. Not -- not till that comes in later in the year
5 when he brings in the cohorts with the baselines
6 assigned to them.

7 Q. Do you know how Dean Farnsworth decides to do
8 that?

9 A. No, I don't for sure. I have a vague
10 recollection that at one point we advised with respect
11 to the cohorts, but I'm not sure how that's done. It
12 may be that before he does that he asks us about where
13 he should be drawing the line. I just don't remember.

14 Q. Has he asked you this year where he should draw
15 the line?

16 A. No.

17 Q. All right. If I show you a list of faculty, do
18 you think you could tell me which cohort each person is
19 in?

20 A. I doubt seriously that I could.

21 Q. Why not?

22 A. I just don't remember where the lines are
23 drawn.

24 Q. What did you review to prepare for this
25 deposition?

1 A. Not very much. I went over a couple of my
2 files.

3 Q. What files?

4 A. My budget committee files, ones that I --

5 Q. Oh, wouldn't that be one you would know, which
6 cohort somebody is in?

7 A. Oh, no, I didn't look in that much detail. I
8 basically looked at my -- read my evaluations that I had
9 done over a couple of years, just a couple of years, and
10 my -- and the memos that I wrote to the dean.

11 Q. Oh, how did you decide what to go over?

12 A. Just wanted to -- my own curiosity really.
13 Nobody told me to go over them or anything.

14 Q. Do you keep notes?

15 A. As the chairman?

16 Q. Yeah.

17 A. Yes. I don't when I'm just a member of the
18 committee.

19 Q. Did you go over your notes to prepare for this
20 deposition?

21 A. No.

22 Q. Is it because your memory is so good that you
23 didn't need to look over any notes?

24 A. No, it's because I didn't have time. I'm
25 trying to get a book out by the end of May.

1 Q. Oh, I see. I mean, you knew what this lawsuit
2 was about, correct?

3 A. Just roughly, yes.

4 Q. Have you ever looked at the lawsuit?

5 A. No.

6 Q. Why not?

7 A. I have a lot to do and that just wasn't one of
8 the things that was at the top of my priority.

9 Q. Even when you were noticed for a deposition it
10 wasn't a priority for you?

11 A. No, not in terms of my scholarship and teaching
12 and other things that I do.

13 Q. All right. So what else besides your notes?

14 A. By way of preparation?

15 Q. Yeah.

16 A. I had a meeting with the two lawyers that are
17 here in the room last, when was it, Saturday, a Zoom
18 meeting.

19 Q. Did you meet with Dean Farnsworth?

20 A. No.

21 Q. Did you meet with any other budget committee
22 members?

23 A. Dean Farnsworth was -- in that Saturday meeting
24 he was on briefly. He entered the meeting on Zoom.

25 Q. All right. Did you meet with any other members

1 of the budget committee?

2 A. No.

3 Q. Did you talk with any other faculty members
4 about this deposition?

5 A. No.

6 Q. What professors were evaluated at the budget
7 committee on Friday?

8 A. Now you're getting into my short-term memory.
9 Which ones were evaluated on Friday. One of them I can
10 remember, it was me because I had to leave the meeting
11 for that evaluation. Let's see, let me think a bit.
12 Either in this last meeting or the meeting before we
13 evaluated Professor Mullenix. It may have been in this
14 last meeting. We -- I'm trying to think of other
15 people. I mean, these things I don't keep in my head.
16 I've got the e-mail from -- from the chairman of the
17 committee somewhere in my e-mails. It said the ones
18 we --

19 Q. When you go to a meeting you evaluate the
20 professors' scholarship, service, and teaching and then
21 you just forget about it immediately?

22 MR. GIBSON: Objection, misstates the
23 record.

24 A. Well, yeah, maybe not immediately, but by three
25 days later after I've been doing a lot of other things.

1 Q. (By Mr. Walsh) What have you been doing?

2 A. Huh?

3 Q. What have you been doing since the meeting on
4 Friday?

5 A. Let's see. Friday afternoon and Friday evening
6 I worked. My wife and I watched a television show.
7 Saturday morning --

8 Q. What television show did you watch?

9 A. It was -- my daughter gave me a -- DVDs of
10 mysteries. I can't recall the name of the mysteries. I
11 do recall. It was a Crossword Mysteries and we watched
12 half of those. I couldn't tell you what happened
13 particularly on that particular episode. Then Saturday
14 morning, most of the morning I work -- I mean, I work
15 early in the morning till my wife gets up and then I --
16 we have breakfast and read newspapers. I read the -- do
17 you want to know the newspapers or. . .

18 Q. Do you remember the newspapers?

19 A. I know the newspapers because I read them every
20 morning.

21 Q. Do you remember any articles you read?

22 A. No, I'm sure I don't remember any articles. I
23 clip the ones that I think I'll use in my research, and
24 I couldn't even tell you whether I clipped any over the
25 weekend but I probably clipped one or two or three. I

1 read the New York Times, Wall Street Journal, and the
2 Austin paper.

3 Then I had a workout. We work out for
4 about two hours on Saturday. I had lunch, usually take
5 a nap on Saturday. After that I worked some more on the
6 book. The book is due at the end of May and I'm behind,
7 so I spend most of my time --

8 Q. What did you do --

9 A. -- working on the book.

10 Q. -- yesterday, Professor McGarity?

11 A. Huh?

12 Q. What did you do yesterday, Professor McGarity?

13 A. Yesterday, that was Sunday. Worked on the book
14 in the morning, had breakfast, worked on the book some
15 more, listened to -- yeah, I guess it was listen -- my
16 grandson's baseball game, which apparently this is
17 amazing to me that they do play-by-plays of 10 and under
18 baseball players of baseball leagues in Washington, D.C.
19 and he is in the 10 and under league. So my wife had it
20 on something and they actually broadcast it. So I think
21 it's computer that does it, so I listened to that. I
22 went to church via video. In the afternoon I worked
23 some more and I think we got groceries delivered. And
24 you want the evening?

25 Q. Well, I guess I'm just kind of surprised that,

1 given that, you can't remember what happened in a
2 meeting on Friday. How many meetings on Friday did you
3 have?

4 A. I think just -- no, I met with a student, one
5 of my tort students, but I couldn't tell you the name,
6 which tort student it was. And then we had the budget
7 committee meeting. I mean, if I sit back and think a
8 while I may be able to come up with someone else who we
9 evaluated, but these just aren't things that I -- to the
10 extent that I needed to talk about the person I had my
11 notes about my evaluation of the scholarship.

12 I do recall that in the last meeting there
13 weren't any of them that came up that I needed to
14 address, which is kind of rare because usually in the
15 meeting there would be one or two that you've done the
16 scholarly -- the scholar reads on, but last time there
17 were none of them. That might be why I'm not
18 remembering as well.

19 Q. Well, wait. So you made a baseline
20 determination about how many -- about these professors
21 at the Friday meeting?

22 A. Yes.

23 Q. Were any of them below baseline?

24 A. (No response.)

25 Q. Were any of them above -- I'm sorry, did you

1 say no?

2 A. No, I didn't say anything. I don't think we
3 had any below baseline, but I can't remember that well.
4 If you give me a minute or two I just -- let me think.
5 No, I am really trying and --

6 Q. So I just want to make sure I understand. So
7 you had a meeting on Friday and you talked about people
8 and you determined what you would recommend to Dean
9 Farnsworth, but you can't remember who you talked about
10 and what you recommended?

11 MR. GIBSON: Objection, misstates prior
12 testimony.

13 A. Yeah, that's what I'm saying at this particular
14 moment.

15 Q. (By Mr. Walsh) And you knew that you were
16 coming to a deposition to talk about your involvement in
17 the budget committee, right?

18 A. That would have been maybe in the back of my
19 mind, but that wasn't what I was thinking about when I
20 was at the budget committee meeting.

21 Q. I know, but you could have reviewed your notes
22 before you came here today, right?

23 A. I didn't make any --

24 MR. GIBSON: Calls for speculation.

25 A. I did not make notes. I make notes when I'm

1 the chairman but not when I'm not the chairman.

2 Q. (By Mr. Walsh) Let me think. So do you
3 remember if anybody was above baseline?

4 A. No. I'm sorry. If I saw the list of people I
5 might remember how we rated them, but --

6 Q. Well, I can show you a list of all faculty
7 members. Do you think maybe seeing their name would
8 help?

9 A. No, I think I need to see the e-mail that I got
10 from Derek Jinks at the beginning of last week. It had
11 the names of the people that we were presumptively going
12 to evaluate.

13 Q. Is that because they're all so similar that you
14 can't differentiate between them?

15 A. I think it's because my memory is that bad.

16 Q. Do you think that -- I mean, if your memory is
17 that bad is it fair that you are evaluating colleagues
18 for raises?

19 A. Of course. When we have the deliberation I
20 don't have to have a memory of what happened three days
21 ago to deliberate if somebody summarizes their
22 scholarship, and we have two or three evaluations to
23 their scholarship and we talk about their service and we
24 talk about -- and there's documents in front of us. I
25 have -- when I'm in these meetings, the Zoom meetings, I

1 have the submission of the faculty member to the
2 committee, so I'm looking at their scholarship.

3 I have before me their teaching
4 evaluations and I have a bar graph that has their
5 teaching evaluations going back about five years. I
6 have, to the extent I want to see it, the scatter plot
7 there. I have a summary of the -- or the mean of the
8 teaching evaluations that I can look at and have the
9 faculty rank by top to bottom of that.

10 So I have a great deal of information
11 before me in addition to hearing the members of the
12 committee who have read the material tell me what they
13 think about the material. So I don't have to remember
14 anything particularly unless I'm talking about an
15 article that I read in which case I do have notes on the
16 articles that I read and I do sometimes before the
17 meeting go over -- I always go over those notes and I
18 sometimes actually go over the actual document itself
19 that was submitted, the article or the book or whatever.
20 So I don't think it depends on my memory what happened
21 three days ago to do that evaluation.

22 Q. Okay. So you just do the evaluation in the
23 moment, right?

24 MR. GIBSON: Objection, misstates prior
25 testimony.

1 A. Would you repeat it again? I do the
2 evaluation --

3 Q. (By Mr. Walsh) You just do the evaluation in
4 the moment?

5 A. In the moment, yeah.

6 MR. GIBSON: Objection, misstates prior
7 testimony.

8 Q. (By Mr. Walsh) So how do you evaluate the
9 scholarship of somebody whose scholarship is not
10 [indiscernible], like all the people you talked about on
11 Friday?

12 A. I just didn't hear you. Say it again.

13 Q. How do you evaluate the scholarship of a
14 colleague you haven't read?

15 A. I listen to the evaluations of the other
16 members of the committee, the members who have read that
17 scholarship.

18 Q. Well, how do you know that that's an accurate
19 description of what's going on?

20 A. That's how the committee works. We -- I assume
21 that their evaluations are accurate and done in good
22 faith.

23 Q. Why do you assume that?

24 A. Because I don't have time to read all of the
25 articles of every member of the faculty to judge

1 otherwise.

2 Q. Well, what standards are applied to evaluating
3 scholarship?

4 A. We look at the quality of the scholarship
5 primarily.

6 Q. Do you think you have the same view of quality
7 as every other professor on the budget committee?

8 A. I'm sure it's not identical, but I think that
9 we have similar views.

10 Q. What is that view?

11 MR. GIBSON: Objection, vague and
12 ambiguous.

13 A. And I said views, so there's more than one
14 view.

15 Q. (By Mr. Walsh) What are the various --

16 A. I think we look for whether it shows analysis
17 or whether the writing is clear, whether the -- it's --

18 Q. Is it possible that you might --

19 A. -- well organized.

20 Q. -- might have a different view of what analysis
21 is?

22 MR. GIBSON: Objection, interrupted the
23 witness. For the record, the witness was not allowed to
24 finish his answer.

25 A. Would you repeat the question?

1 Q. (By Mr. Walsh) Is it possible you have a
2 different view of analysis than another person on the
3 budget committee?

4 MR. GIBSON: Objection, calls for
5 speculation.

6 A. Oh, I think it's possible, sure.

7 Q. (By Mr. Walsh) Okay. So how is that a fair
8 way to evaluate? If you have two different views of
9 what is analytical, then it sounds subjective to me.
10 Would you agree?

11 MR. GIBSON: Objection, calls for
12 speculation.

13 A. No, I don't know that there are two different
14 views of what's analytical. If I have a question about
15 the -- what the budget committee member said by way of
16 analysis, I'll ask the question. And that happens --

17 Q. (By Mr. Walsh) Did you --

18 [Simultaneous speaking]

19 A. -- that happens frequently. I'm sorry?

20 Q. Did you have any questions on Friday?

21 A. Not that I can recall.

22 Q. But you can't recall anything about that
23 meeting, right?

24 MR. GIBSON: Objection, misstates prior
25 testimony.

1 A. I in the moment have not been able to recall
2 who we talked about in that meeting. I'll keep
3 thinking. If I think of someone I will let you know.

4 Q. (By Mr. Walsh) What was said about Professor
5 Mullenix?

6 A. There was a review of her scholarship and my
7 recollection is it was a -- it was a plus.

8 Q. Was she rated baseline, above baseline, below
9 baseline?

10 A. My recollection, and again, it's not -- I don't
11 have that great of a recollection. I'm fairly confident
12 it was not below baseline or baseline minus. My guess
13 is it was -- or my recollection is it was baseline.

14 Q. Do you remember anything else about the
15 discussion regarding Professor Mullenix?

16 A. I just remember the description of an article
17 she wrote that there were -- yeah, and this did happen
18 last Friday because now it's coming back to me. A piece
19 that she wrote in I think Jotwell and a -- one or more
20 of her Supreme Court previews.

21 Q. What was discussed about them?

22 A. The article, as I said, was a positive, said it
23 had -- maybe it was a chapter in a book. It was either
24 an article or a chapter in a book, was that it contained
25 mostly description but some analysis. The Supreme Court

1 previews were just description and I think the Jotwell
2 article was the same.

3 Q. Was all of that counted as scholarship?

4 A. Yes, although I think there may have been some
5 discussion about whether the Supreme Court previews
6 should be regarded as service as opposed to scholarship,
7 but I viewed it at least as scholarship.

8 Q. Why did you view it as scholarship?

9 A. It's something. It's -- it doesn't require a
10 lot of analysis, but I think it's definitely service in
11 the sense that it's useful to the legal community to
12 have someone who's knowledgeable about cases going
13 before the Supreme Court and has looked at the briefs,
14 to condense that and describe it carefully and maybe
15 present some kind of prediction or if it's after the
16 Supreme Court decided some take on the Supreme Court's
17 decision. I think that's useful to the -- to the
18 profession.

19 In terms of scholarship, it's modest
20 scholarship but there was scholarly effort that went
21 into it to interpret the cases, to put them in place.
22 But as I say, it's not a whole lot of analysis. It's
23 also rather short, so there's not much that can be there
24 in the con- -- and she's working within, I take it, a
25 paradigm that she needs to fit the -- whatever the

1 requirements of the publication are.

2 Q. Do you know what the requirements of the
3 publication are?

4 A. Not for the Supreme Court previews, no.

5 Q. Have you ever written a Supreme Court preview?

6 A. No.

7 Q. Do any other faculty members write Supreme
8 Court previews?

9 A. I don't know. I don't recall.

10 Q. You don't know? Aren't you --

11 A. I --

12 MR. GIBSON: Objection. Is the question
13 are you on the budget committee?

14 Q. (By Mr. Walsh) How do you not know if other
15 professors write Supreme Court previews if you're on the
16 budget committee?

17 A. I think I've seen Supreme Court previews as a
18 member of the budget committee. Not every faculty
19 member that writes things like that submit them to the
20 budget committee. I certainly don't.

21 Q. Do you write Supreme Court previews?

22 A. No.

23 Q. What don't you submit to the budget committee?

24 A. Articles that I write, op-eds, white papers
25 that I work on for the Center For Progressive Reform

1 that I'm an author on. I guess I have submitted
2 articles in American Prospect that I've written if
3 they're long, but not short, two- or three- or four-page
4 things.

5 Q. Do you know the kind of work that goes into
6 writing a Supreme Court preview?

7 A. I have an idea of how much went into by reading
8 it, yes, but I don't know in terms of number of hours or
9 something like that.

10 Q. Do you know how well they are received outside
11 the law school?

12 A. No, I don't think I've heard how well they're
13 received outside the law school.

14 Q. Well, would it matter to the budget committee
15 if these Supreme Court previews were highly thought of
16 outside the law school?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. Matter to the budget committee. I don't think
20 it would matter a lot, no.

21 Q. (By Mr. Walsh) What if other professors at
22 other law schools valued these Supreme Court previews?

23 MR. GIBSON: Objection, vague and
24 ambiguous question.

25 Q. (By Mr. Walsh) Would that matter at all?

1 A. No, not a lot.

2 Q. Why not?

3 A. Because I think we feel like we're capable of
4 reading them and evaluating them.

5 Q. Well, why is your judgment better than the
6 judgment of other professors outside of U.T. Law?

7 MR. GIBSON: Objection, misstates prior
8 testimony.

9 A. I suppose if we had some sort of submission
10 from somebody from outside the law school saying that
11 this is a terrific Supreme Court preview and it came
12 before us, we would consider that.

13 Q. (By Mr. Walsh) What about if Supreme Court
14 justices read the Supreme Court previews, would that
15 matter to the budget committee?

16 MR. GIBSON: Objection, calls for
17 speculation.

18 A. I can speak for myself and I would say it
19 wouldn't matter a lot.

20 Q. (By Mr. Walsh) Why not?

21 MR. GIBSON: Objection, calls for
22 speculation.

23 A. Well, because I know the Supreme Court justices
24 read lots of things and some are high quality, some are
25 less high quality, and the fact that a Supreme Court

1 justice read it doesn't mean that it's of high quality.

2 Q. (By Mr. Walsh) What if a Supreme Court justice
3 had praised it?

4 MR. GIBSON: Objection, calls for
5 speculation.

6 A. And that came before the budget committee?

7 Q. (By Mr. Walsh) Uh-huh.

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. So that we had some note from the Supreme Court
11 praising -- from a Supreme Court justice praising it
12 that came before the budget committee? I think we would
13 consider that. We would still evaluate the article on
14 its merits.

15 Q. (By Mr. Walsh) But how do you -- I guess what
16 my issue is, though, is it sounds like there could be a
17 difference of opinion on whether something has merit or
18 not. Do you agree?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. You say there could be. Yeah, I think there
22 could be. There's differences of opinion about lots of
23 things, but certainly on that as well.

24 Q. (By Mr. Walsh) I mean, so then would you say
25 that evaluation of scholarship is subjective?

1 MR. GIBSON: Objection, vague and
2 ambiguous.

3 A. It involves judgment. There's a certain
4 subjectivity to that I suppose.

5 Q. (By Mr. Walsh) So when -- why doesn't the
6 budget committee consider outside reception of a
7 professor's scholarship in evaluating scholarship?

8 MR. GIBSON: Objection, misstates prior
9 testimony.

10 A. Well, as I said, if we have some document or
11 something rather than just hearsay as to what some
12 particular scholar has to say about an article, we would
13 consider that.

14 Q. (By Mr. Walsh) So if you remember, in the
15 morning session we went through a whole bunch of indicia
16 of scholarship and whether it's highly regarded outside
17 the law school. You remember that?

18 A. Yes.

19 MR. GIBSON: Colin, I apologize, I'm
20 having technical [indiscernible] --

21 MR. WALSH: I see him talking, but I can't
22 hear what he's saying.

23 THE WITNESS: He's saying he has a
24 technical issue and he'd like to pause for a couple of
25 minutes until he figures it out.

1 MR. WALSH: Oh, yeah, let's go off the
2 record.

3 THE VIDEOGRAPHER: Off the record at
4 1:58 p.m.

5 (Recess taken from 1:59 p.m. to 2:04 p.m.)

6 THE VIDEOGRAPHER: We are back on the
7 record. The time is 2:03 p.m.

8 Q. (By Mr. Walsh) Okay. So before we took that
9 short break we were talking about Supreme Court previews
10 and outside evaluation on scholarship. Professor
11 McGarity, you said that the budget committee would
12 consider outside evaluations of professor scholarship.
13 Is that correct?

14 A. If we had some document or something like that.
15 We do not solicit outside evaluations as a normal
16 matter, but if --

17 Q. Do you tell professors that they can submit
18 outside evaluations?

19 A. We tell professors to submit anything they
20 think would be relevant.

21 Q. Do you tell them that they can submit outside
22 evaluations of their scholarship?

23 A. I think that's included in anything that they
24 think is -- if they think it's relevant they can submit
25 it.

1 Q. Well, I mean, I guess the reason I'm asking
2 is -- well, I'm asking specifically, is that mentioned?

3 MR. GIBSON: Objection, vague and
4 ambiguous.

5 A. No. As I said, we don't ask for outside
6 evaluations in the context of our normal budget
7 committee deliberations. I don't know that we say on
8 the -- in the memo that solicits the contribution for
9 the past year from the faculty member, I don't think it
10 says please submit outside evaluations, but they're
11 certainly -- certainly welcome to do so.

12 Q. (By Mr. Walsh) Did you read any of Professor
13 Mullenix's scholarship this year?

14 A. This year, no.

15 Q. How do you know it was descriptive?

16 A. That was as it was described to the committee
17 by the people who read it.

18 Q. Who read it?

19 A. Who read -- the article that I remember, or
20 chapter, whatever it was, was not the Supreme Court
21 review. And Jotwell was Lynn Baker, I think. The
22 others, I don't recall who read them.

23 Q. Okay. And Professor Baker said that the
24 article was mostly descriptive, is that --

25 A. That it was descriptive, but it had some

1 analytical heft to it as well. That was my word, heft.

2 I don't know that she used it, but that's what I know.

3 Q. So who else was talked about at this meeting?

4 MR. GIBSON: Objection, asked and
5 answered.

6 A. You did ask me that before and I'm still trying
7 to remember other people. I think we may have talked
8 about Bob Bone. I'm thinking about that, but I'm not
9 sure.

10 Q. (By Mr. Walsh) What was said about Bob Bone?

11 A. I don't recall. I'm not even sure that we did.
12 Again, I'm just trying to probe my memory here.

13 Q. How come you remember that Professor Mullenix
14 was talked about? You even remember the description of
15 three different pieces of scholarship, but you can't
16 remember a single other person?

17 A. Well, I'm still thinking about it, so I can
18 probably think of some other people. I wasn't even sure
19 when I started talking about it whether it was this last
20 meeting. Now in talking about it, it brought that to
21 mind. Maybe if we go down the list of faculty members,
22 maybe I could tell you which ones we --

23 Q. Professor Bob Bone?

24 A. I'm sorry?

25 Q. Professor Bob Bone, what was discussed about

1 him?

2 A. I don't recall.

3 Q. Do you remember whether he was rated baseline,
4 above baseline, below baseline?

5 A. I don't even recall that we did talk about him
6 now that I'm thinking about it. No, not -- just off the
7 top of my head, no.

8 Q. Will you agree with me that it is suspicious
9 that you can only remember one faculty member that the
10 budget committee discussed?

11 MR. GIBSON: Objection. Colin, that's an
12 abusive and harassing question. I would ask that you
13 not harass the witness, and I would ask that you move on
14 and ask a different question.

15 Q. (By Mr. Walsh) You can answer.

16 A. I don't think it's suspicious. We're here in a
17 Mullenix deposition so that came to mind. Let's go down
18 the list and I can probably think of some people we
19 talked about.

20 Q. Well, I mean, you know that, for example,
21 you're named as one of her comparatives, correct?

22 A. Right, and I do know that I was discussed
23 Friday because I had to leave the meeting for that.

24 Q. And you know that Professor Bob Bone was named
25 as one of her comparatives, correct?

1 A. Yes.

2 Q. And you know that Professor Jay Westbrook was
3 named as one of her comparatives, right?

4 A. Yes. And I can tell you we did not talk about
5 Jay on Friday.

6 Q. Well, how can you be sure that you didn't talk
7 about Jay but not sure whether or not you talked about
8 Bob Bone?

9 A. Because I have read something from Jay and it
10 hasn't -- he hasn't come up yet. We still have more
11 meetings and I haven't presented what I've read about
12 Jay. I did not read anything about Bob, so I don't
13 know -- I can't recall that.

14 Q. All right. Before we talk about Bob Bone, I
15 did want to just show you what I've marked as
16 Exhibit No. 4. It's in the chat. Here's an e-mail from
17 Professor Rich Freer. Do you know who that is?

18 A. Rich Freer. No, I don't.

19 Q. Do you know any prominent professors in civil
20 procedure?

21 A. I don't know whether I do or don't.

22 Q. You don't know whether you do or don't. What
23 does that mean?

24 A. Because I don't know -- some professors I know,
25 I don't know what they teach. The professors who I know

1 who I know what they teach don't teach civil procedure
2 that I can think of.

3 Q. Okay. So, I mean, that even -- I guess that
4 then begs the question why you're even passing judgment
5 on a civil procedure scholarship; if you don't know
6 prominent professors, you don't read the scholarship,
7 why should you be allowed to evaluate it?

8 A. When I read the scholarship, and I have read
9 scholarship on civil procedure, then I have my sense of
10 the quality of the scholarship. When I don't read it I
11 depend on the committee members' sense of the
12 scholarship.

13 Q. So it's possible that if the committee members
14 mischaracterize scholarship, that just gets adopted by
15 the committee, correct?

16 MR. GIBSON: Objection, calls for
17 speculation.

18 A. It's possible, yes.

19 Q. (By Mr. Walsh) There would be no way to know
20 because most budget committee members don't read all of
21 the scholarship by every professor?

22 MR. GIBSON: Objection; compound question,
23 calls for speculation.

24 A. The second half of the question I can answer
25 very definitively is that yes, every member of the

1 committee does not read all of the scholarship.

2 Q. (By Mr. Walsh) Okay. So I want to ask you
3 about this Rich Freer e-mail. So here he says, "Linda:
4 I forgot completely about the Previews." And then in
5 the next line he says, "I find it astonishing that they
6 don't 'count' things like the Preview and blogs. Those
7 Preview pieces are terrific, and I thought we wanted to
8 be cutting-edge so blog stuff should 'count'." And then
9 he described what happens at Emory. Are you able to
10 read it?

11 A. Can you make it a little bigger?

12 Q. How is that?

13 A. Yeah, I think I can read that. Let's see.

14 Q. So I'm really only interested in this stuff
15 right here. What do you think about the way Emory does
16 it?

17 MR. GIBSON: Objection, calls for
18 speculation.

19 A. I think that -- do you want my just firsthand
20 impression of that? If that's in fact what they do,
21 then they must have a whole lot of time to be reading
22 everybody's blogs. When it comes to the previews, our
23 committee does consider the previews. We don't
24 generally consider blogs. Sometimes people submit them.
25 I write many blogs and I never submit blogs to the

1 committee; but when people do, it has to be a very
2 substantial blog before we would give it much weight.
3 And that's something that I think is -- in academia
4 right now is something that's kind of subject to
5 discussion and debate as the extent to which somebody
6 who is just all the time blogging.

7 My view of blogs even though I write them
8 frequently is that they're not scholarship at all;
9 they're service, they're opinion. They don't
10 necessarily make an effort to be neutral, objective,
11 scholarly, academic about it. They're often used to
12 persuade, so they're more in the nature of briefs, and
13 therefore I personally don't give much weight or don't
14 give any weight to blogs.

15 Q. (By Mr. Walsh) Well, wait a second, Professor
16 McGarity. I thought a lot of law review articles argued
17 for a certain position.

18 A. Oh, they do, but I'm talking about more in the
19 lines of a partisan position or something like that.
20 But in any event, even though they do they're well
21 developed. They answer the objections or anticipate and
22 answer objections. Blogs don't do that or not all do.
23 I'm sure some do so I hate to characterize all blogs.

24 But I can tell you that generally our
25 feeling is that we don't want faculty members submitting

1 every blog they wrote. And if they did and the question
2 came up, well, do we read them all, I think we'd have to
3 have a big discussion about that because the members of
4 the committee have limited amount of time too. They're
5 active scholars and they're trying to get work done and
6 their teaching done and so it would be a question --
7 it's a question maybe at some point we would change our
8 minds, but at this point we don't really consider blogs.
9 We do consider the Supreme Court previews and we do
10 consider Jotwell.

11 Q. What does it mean for a professor to be rated
12 baseline?

13 A. It means that they're performing and they're --
14 the quality and the quantity of the research is good,
15 their service is good or on balance, and their teaching.
16 It's a balancing of all -- some people, they don't have
17 quite as good of teaching performance that year. If
18 they have great scholarship, we balance that. In some
19 instances service can outweigh a bad teaching evaluation
20 or below average teaching evaluations or scholarship.
21 So it's a balance, and baseline means that you're
22 doing -- doing fine.

23 Q. Now, if two professors are both rated baseline,
24 what does that mean?

25 A. It means they're both doing fine. We're happy

1 with their performance.

2 Q. Equally happy with their performance?

3 A. I don't know what you mean by equal. We're
4 happy.

5 Q. If you have five professors rated baseline are
6 they all at the same level?

7 A. Yeah, in terms of our evaluation this year of
8 their performance, they're performing at about the same
9 level, yeah, but that's an overall evaluation.

10 Q. What do you mean?

11 A. Somebody might not be teaching as well as
12 someone else rated baseline but they might have better
13 scholarship or a better year scholarship-wise.

14 Q. But overall if somebody is rated -- but if
15 somebody is rated baseline, that means overall they're
16 all about the same, all the baseline people?

17 MR. GIBSON: Objection, misstates prior
18 testimony.

19 A. They're all performing adequately.

20 Q. (By Mr. Walsh) Would you be in the same cohort
21 in terms of baseline evaluation as Professor Mullenix?

22 A. In terms of base- -- in the same cohort? Oh,
23 in terms of who would evaluate?

24 Q. In terms of like baseline raise.

25 A. In terms of how much that would be? Probably.

1 I'm not positive about that, but probably. She's --
2 well, we looked at the chart. She's a few years fewer
3 than me, although in terms of our -- I guess in JD or
4 whatever, but I'm -- I can't be for sure but it's
5 possible. She may be in one where the baseline would be
6 a higher -- slightly higher amount, but I don't know.
7 Probably.

8 Q. What about Professor Bone and Professor
9 Mullenix?

10 A. Who was the first one?

11 Q. Professor Bone.

12 A. I think they would be in the same category for
13 sure.

14 Q. What about Professor Westbrook and Professor
15 Mullenix?

16 A. Westbrook would be more like me. In fact, he's
17 more years out than I am.

18 Q. What about Professor Rabban?

19 A. He'd be with me. We're very close, my
20 recollection is, in terms of years past the JD at least.

21 Q. So Rabban would not be with Professor Mullenix
22 or Professor Bone?

23 MR. GIBSON: Objection, misstates prior
24 testimony.

25 A. No, it's conceivable that we'd all four be in

1 the same category, but there may be a line -- I don't
2 know where the dean draws the line each year. There may
3 be a line between Rabban and Bone and Mullenix, but it's
4 quite likely we're all in the same category. You can
5 ask the dean that.

6 Q. (By Mr. Walsh) What about Professor Levinson
7 and Professor Mullenix?

8 A. Levinson would be in my category for sure, and
9 possibly or maybe even probably in Mullenix's category.

10 Q. What about Professor Hu?

11 A. Hu, if you've got that chart and you can show
12 me where he is on the chart. I think he's behind
13 Mullenix in terms of years out or years in teaching.

14 Q. Now, are you sure that cohorts are drawn by
15 years of teaching as opposed to salary level?

16 A. Yeah, I'm real clear about that. Like, for
17 example, look at SMJ out there, he's the most years out.
18 That's Stanley. And we evaluate him in my cohort, I'm
19 sure of that.

20 Q. And so that means that he would get a lower
21 baseline raise --

22 A. Generally, yeah.

23 Q. -- or is that a higher baseline raise?

24 A. Lower.

25 Q. Okay. So the longer you've been out, the lower

1 your baseline raises?

2 A. That's -- the practice has been to try to
3 reward the younger folks more and equal things out a
4 little bit, I guess -- not equal, that's not it, but get
5 them up so then we don't lose them.

6 Q. That makes sense. All right.

7 A. I didn't answer your question about Henry yet.

8 Q. Oh, you're right. Are you able to see it?

9 A. No. Can you make it a little bigger? Now,
10 let's find Linda. She's here. And then where is Henry
11 Hu? Oh, there it is, Henry T. Hu. So he probably would
12 be in the same category as Linda, be my guess.

13 Q. Oh, I see it right here.

14 A. Yeah, right up there.

15 Q. So probably -- so safe to -- how many different
16 cohorts are there; do you know?

17 A. Seems like maybe about -- my recollection is
18 like there's three different sort of low or -- low in
19 terms of years out and medium and high. But again,
20 that's something you should ask the dean about unless
21 you've got one of these memos that he sent that has the
22 recommendations. That would make it clear.

23 Q. And then over here it looks like EE,
24 Encamacion, he would be in the cohort that gets the
25 highest baseline raises?

1 A. Yeah.

2 Q. Do you know, are these cohorts generally equal
3 in terms of the number of people in them, or not?

4 A. I don't know, but I think probably not because
5 obviously the older ones, we fade away and then people
6 retired and there tends to be fewer out there, although
7 people migrate over like I have.

8 Q. So earlier you talked about you served on the
9 budget committee under Dean Sager?

10 A. Yes.

11 Q. And were you on the budget committee in spring
12 of 2010?

13 A. I can't say for sure. I don't know. Oh, no, I
14 would say almost certainly I was on the budget
15 committee. I don't know whether I was the chairman that
16 year, but if that's the Sager year, I think I was on the
17 budget committee all the Sager years.

18 Q. Now, did you -- do you remember meeting with
19 Professor Mullenix in 2010 about the Equal Pay Act?

20 A. No.

21 Q. Can you remember ever meeting with Professor
22 Mullenix about the Equal Pay Act?

23 A. No, not particularly about that subject. I met
24 with Professor Mullenix, but not that I can recall about
25 that subject.

1 Q. What about about pay in general?

2 A. Recently she visited my office back before
3 COVID asking whether I thought she was the -- should be
4 the most poorly paid member of the faculty. I remember
5 that meeting. That had to do with pay. I don't know if
6 it had to do with equal pay, but it had to do with pay.

7 Q. Any other time?

8 A. Talking just about pay? Just -- just about pay
9 particularly?

10 Q. Yes.

11 A. And not other emoluments of scholarship or
12 teaching or service. No, I can't remember --

13 Q. I'm asking you about pay.

14 A. No, I can't think of any other time or I don't
15 recall it.

16 Q. Oh, no, now you've piqued my interest. What
17 other emoluments of service has she come and talked to
18 you about?

19 A. At one point she didn't -- the budget committee
20 awarded a chair to Inga Markovits and she in the hallway
21 in front of the elevator sort of confronted me about
22 that. That was a long time ago, but it stuck in my head
23 because there was students there and I asked her can we
24 go to my office and talk about it. It wasn't
25 particularly about pay, but she thought she deserved a

1 chair and I think at some point she did in fact get a
2 chair.

3 Q. Okay. Do you know whether Professor Mullenix
4 made an Equal Pay Act complaint in 2010?

5 A. I know there was a complaint made that she
6 filed or I'd heard that there was a complaint made and I
7 don't remember whether it was 2010 precisely. It would
8 have been somewhere around that time.

9 Q. During your time on the budget committee have
10 you ever discussed the Equal Pay Act during budget
11 committee deliberations?

12 A. I think at some point we talked about -- we've
13 talked about equal pay in terms of gender or sex and
14 also we've talked about -- I don't know if the Equal Pay
15 Act, I'm just not familiar with it to know whether it
16 deals with age discrimination. I think that may be
17 different, Age Discrimination Employment Act, and we've
18 talked about that as well just as a matter of
19 information and. . .

20 Q. So what does the budget committee discuss when
21 they talk about the Equal Pay Act?

22 A. Just I think that we're obliged to by law treat
23 people equally when they're equally situated.

24 Q. So how does the budget committee determine
25 whether that is happening?

1 A. We don't have a particular evaluation. I think
2 we just understand among ourselves that that's -- that
3 that is one of the legal requirements that govern what
4 we do.

5 Q. Okay. But you don't make any kind of active
6 effort to ensure that that's happening?

7 MR. GIBSON: Objection, misstates prior
8 testimony.

9 A. Not in the sense like the university asks us or
10 in fact compels us to undergo the training. We don't do
11 training. We all undergo the university's training,
12 though. I take it. I mean, I can't speak for the other
13 members of the committee. I know that I do.

14 Q. (By Mr. Walsh) So is it possible that there
15 are tenured law faculty who are not paid equally under
16 the Equal Pay Act --

17 MR. GIBSON: Objection, calls for a
18 legal --

19 Q. (By Mr. Walsh) -- to their male or female
20 competitors?

21 MR. GIBSON: Objection; calls for a legal
22 conclusion, calls for speculation.

23 A. I hope not. We do our best. And I can't speak
24 for the dean. The dean makes the ultimate decision
25 about salaries.

1 Q. (By Mr. Walsh) All right. So is it possible
2 that that is occurring, though?

3 MR. GIBSON: Objection, calls for a legal
4 conclusion. Objection, calls for speculation.

5 A. That question is like -- is zero risk. There's
6 always some possibility I suppose. I hope that it
7 doesn't happen. I've never seen it happen.

8 Q. (By Mr. Walsh) Well, what are you looking for?

9 MR. GIBSON: Objection, vague and
10 ambiguous.

11 A. Evidence that somebody is discriminating.
12 Somebody saying, well, no, we shouldn't give her as big
13 a raise as him because she's a woman. I mean, that's
14 one --

15 Q. (By Mr. Walsh) Any other kind of evidence --

16 A. That's not all I would look for, but that's --
17 obviously if I heard that I would think that was a
18 problem.

19 Q. I guess I'll just ask it. Have you ever heard
20 that?

21 A. No.

22 Q. All right. So what other types of evidence
23 would you look for to determine whether or not somebody
24 was being discriminated against in terms of pay?

25 MR. GIBSON: Objection, calls for

1 speculation.

2 A. I just think I'd be looking for evidence
3 that -- if I was looking for it -- I mean, I would be
4 looking for it, it would be that somebody wasn't being
5 treated fairly because of their sex, whether --

6 Q. How would you determine that?

7 MR. GIBSON: Objection, calls for
8 speculation.

9 A. Well, you would look at whatever indicia of
10 scholarship, service, teaching that you have, and if you
11 see someone that's -- looks to be equivalent with
12 respect to that, that they were treated differently.

13 THE WITNESS: Excuse me just a second.
14 I'm just seeing a little piece of the screen here. Can
15 you make it so that I can see the whole screen, please?

16 MR. GIBSON: Hold on just a second,
17 please.

18 (Brief interruption.)

19 A. Go ahead, I'm back.

20 Q. (By Mr. Walsh) So I want to show you Exhibit
21 No. 5. So here we have -- here's a chart comparing
22 Professor Mullenix and Professor Robert Bone, and I
23 believe you just testified that you would look at
24 teaching, you would look at scholarship, you would look
25 at service. Is that correct?

1 A. That's correct.

2 Q. So if we go through this, you see that
3 Professor Mullenix and Professor Bone are about the same
4 age?

5 A. Uh-huh. Yes.

6 Q. Professor Mullenix has had many more years of
7 teaching, 45 years to 36. Do you see that?

8 A. Uh-huh.

9 Q. Is there any reason to think that that's not
10 accurate?

11 MR. GIBSON: Objection, calls for
12 speculation.

13 A. We were talking about where we start teaching.
14 Is that teaching since -- is that law school teaching or
15 is that -- does that include the undergrad teaching?

16 Q. (By Mr. Walsh) That would include undergrad
17 teaching.

18 A. So, but I --

19 Q. But we took them out earlier and we still saw
20 that Professor Mullenix has more teaching than Professor
21 Bone, correct?

22 A. That's -- that's correct.

23 Q. Before we move on from that I do want to ask,
24 Sandy Levinson used to teach undergrad, correct?

25 A. Yes.

1 Q. And that counts towards his teaching
2 experience, correct?

3 A. Not that I know of.

4 Q. If it did, then would it be appropriate to
5 count Professor Mullenix's undergrad teaching?

6 A. If it did for Professor Levinson?

7 Q. Yeah.

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. Yeah, I think we should treat them
11 equivalently. If we're doing it -- whatever we do, we
12 should do it for everyone when it comes to that. I just
13 don't recall how we resolved that issue when we created
14 those charts.

15 Q. (By Mr. Walsh) So then we have educational
16 degrees. Would visiting professorships at T14 schools
17 be something that you could compare two faculty members
18 on?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. As I mentioned earlier, it would depend on the
22 nature of the visit.

23 Q. (By Mr. Walsh) Well, let me specify. A
24 look-and-see visit?

25 A. Then yeah, that would be something I think

1 that's -- we're just making this in terms of just a
2 general comparison. Would that affect my judgment, is
3 that what you're saying? Because we're not looking at a
4 year's worth of scholarship here; we're just looking --
5 we're looking at the whole career, right?

6 Q. Uh-huh, to determine whether or not these
7 people are competitors or should be paid equally.

8 A. If they were look-see visits, yeah, I think
9 that would make some -- is of interest.

10 Q. And what's a look-see visit?

11 A. That is we're thinking about hiring you, come
12 visit and teach here and we'll make a decision. It's
13 not nearly as I think relevant as an offer from that
14 institution to come teach here, but a look-see visit I
15 think is -- in terms of just my comparing people would
16 be something I'd consider.

17 Q. What about professional honors?

18 A. It depends on the honors.

19 MR. GIBSON: Objection, vague and
20 ambiguous.

21 Q. (By Mr. Walsh) Well, what about these honors
22 listed right here on this chart?

23 MR. GIBSON: Objection, vague and
24 ambiguous.

25 A. Again, what you're asking me to compare now is

1 not what we do on the budget committee. But just my
2 opinion of the comparisons, I think all of those honors
3 are impressive to me on both sides.

4 Q. I agree. And then we have career publication
5 record. This would be a relevant consideration in
6 determining whether or not these are comparators,
7 correct?

8 MR. GIBSON: Objection, calls for a legal
9 conclusion. It calls for speculation.

10 A. This is, again, not for any individual year
11 where the budget committee is making determination.
12 You're asking me if looking at these two, would it
13 affect my determination of I guess equality or
14 something. I'd like to know what those 321 publications
15 or those 62 publications were --

16 [Simultaneous speaking]

17 Q. Well, if you look it says 22 books, 80
18 articles, 10 chapters, 15 treatise updates, 194 short
19 commentary. And if you go under Professor Bone's it
20 describes it in similar fashion.

21 A. The short commentary wouldn't make a great deal
22 of difference to me. Treatise update --

23 Q. We could eliminate that entire line and
24 Professor Mullenix would still have more.

25 MR. GIBSON: Mr. Walsh, you're

1 interrupting the witness before he's finished answering
2 questions, for the record. I would request that you let
3 him finishing answering questions. And is there a
4 question on the table? We could eliminate that entire
5 line I think is what you said last. Could you ask a
6 question?

7 Q. (By Mr. Walsh) Yeah, and Professor Mullenix
8 would still have more, correct?

9 A. Well, I wasn't finished answering your
10 question, the first -- the earlier question. Because I
11 wouldn't treat the treatise updates as having a great
12 deal of significance either. I would want to know --
13 the chapters I think I would regard as roughly
14 equivalent. The articles I would regard as roughly
15 equivalent, again wanting to know what sort of articles
16 they were.

17 The books I think are roughly -- I'm not
18 saying these are equivalent, but I would regard -- I
19 would regard books in my judgment. I'd want to know
20 what the 22 books were. Case books, first edition of a
21 case book I give a good deal of credence to. There's a
22 lot of work that goes into that and a lot of thought and
23 analysis. The update of a case book, the second edition
24 or the third edition I wouldn't give a great deal of
25 weight to. But I certainly give a great deal of weight

1 to books generally. I think that's what I would give
2 the highest weight to.

3 Q. Okay. And then if we look at citations, is
4 that a relevant consideration?

5 A. In one year or two maybe our committee did look
6 at citations, but it became very difficult to know where
7 they were coming from. They're very different --
8 different entities produce these, SSRN and that sort of
9 thing. Some people are more sophisticated about getting
10 their work on to these lists that prepare these lists of
11 citations. So as a matter of -- for the budget
12 committee we haven't looked at them in many years.

13 From my personal, because I guess you
14 asked for my personal judgment here when we're making
15 these comparisons, they don't count for a lot. They
16 count for something. Different disciplines get more
17 citations and court opinions, for example, than others,
18 but that was just total citations you were mentioning.
19 Is that -- if I'm not mistaken. Citations, I take it,
20 in judicial opinions and articles and that sort of
21 thing?

22 Q. Uh-huh. So citations don't matter?

23 A. We've not looked at citation lists in the last
24 few years.

25 Q. Well, isn't there a way to measure scholarly

1 impact?

2 MR. GIBSON: Objection, calls for -- vague
3 and ambiguous.

4 A. Is it a way to measure scholarly impact?

5 Q. (By Mr. Walsh) Yes.

6 A. It probably has some relevance to scholarly
7 impact. There's just a lot of problems with just raw
8 lists of citations because, among other things, one can
9 cite one's own work a lot and up one's citation count.
10 If you're just asking me a personal look at it and apart
11 from the budget committee, I would say it has some
12 impact, yeah. It has some -- it is some measure of the
13 impact of the scholar's work.

14 Q. How would you determine scholarly impact of a
15 law professor?

16 A. I would look to the peers that are people
17 working in the same field and I would ask them I think
18 would be my first place to go.

19 Q. So you would look outside the law school to
20 determine scholarly impact?

21 A. Yeah, you're just asking for me personally.
22 Yeah, I would -- if you're talking about impact, and
23 that's not one of our criteria, is scholarship, not
24 scholarly impact, though I think -- I wouldn't exclude
25 scholarly impact as being relevant. I think it would go

1 to the people in the field and I think you would look at
2 citations. They'd have some relevance. As I say, the
3 committee looked at them a couple of years but found out
4 it was just -- it was very difficult to -- there was
5 just a lot of disagreement, as I recall, among these
6 various sources of citations.

7 And I guess when it comes to blogs or
8 whatever they call it, hits and that sort of thing, how
9 many people download the article from SSRN or how many
10 people looked at it in SSRN, those tended to me to be
11 kind of difficult to evaluate. I think just straight
12 citations is easier and probably more relevant.

13 Q. Okay. Then what about teaching, cumulative
14 teaching average, that would be another way to compare,
15 correct?

16 A. Yes, I think that would be, on their teaching
17 evaluations.

18 Q. All right. So looking at this chart, does it
19 seem like these two people should be paid the same?

20 MR. GIBSON: Objection, calls for a legal
21 conclusion.

22 A. What a person is paid is cumulative over a
23 number of years, so I couldn't tell you in this year
24 whether they should be paid the same based on that.

25 I'll also mention that I don't know the

1 ins and outs of this, but when we're just talking about
2 Bob Bone, there was some kind of deal he struck with
3 Larry when he came on having to do, as I've heard but
4 this is just secondhand, that he didn't get his -- his
5 whole pension didn't transfer from wherever he was prior
6 to coming to U.T. and there was some rough effort, I
7 think, to make up for that. I'm not saying I agree with
8 that. I'm just saying I think that's what accounts for
9 that -- his high salary to some extent. So in that
10 comparative situation that may account for the
11 differences in salary.

12 Q. (By Mr. Walsh) So let me just come out
13 straight and ask it. Should Professor Bone be paid more
14 than Professor Mullenix?

15 A. I don't know the ins and outs of that --

16 Q. Professor McGarity, in your opinion, should --

17 A. -- that agreement.

18 Q. -- Bob Bone be paid more than Professor
19 Mullenix?

20 A. I've asked the same question about myself,
21 should Professor Bone be paid more than me, and the
22 answer I've come to is that something about that
23 agreement accounts for it. In terms of if we took that
24 agreement out of it, it would also depend not just on
25 the number of articles but on the quality of the

1 articles, not just on the number of books but on the
2 quality of the books, and the citations I think you can
3 go with the numbers. I'm not going to suggest that
4 there's a different quality, although there may be. I
5 mean, even there, a Supreme Court citation probably is
6 worth more than a citation in a county judge opinion.
7 So there's qualities involved in this as well as just
8 quantity.

9 Q. Professor McGarity, you've been on the budget
10 committee for decades?

11 A. Yeah.

12 Q. So to evaluate all of these professors you vote
13 on these professors. You've been voting on whether or
14 not Professor Mullenix is baseline, above baseline, or
15 below baseline, again for decades. In your opinion
16 should Professor Bone be paid more than Professor
17 Mullenix?

18 A. Again, on the merits apart from the deal that
19 they cut, I would say --

20 Q. Based on the merits apart from the deal.

21 A. Apart from the deal, probably somewhat more,
22 maybe not as much more as he is being paid but somewhat
23 more, yes, based on the quality of his scholarship.

24 Q. Have you read Professor Bone's scholarship?

25 A. Over the years I think I've read a piece or two

1 of his, but again, I'm depending mostly on the reviews
2 of the people on the budget committee who have read his
3 scholarship.

4 Q. So what does somewhat more mean?

5 A. I don't know. I can't tell you in numbers. I
6 think his scholarship is generally better than Linda's.
7 I think that -- but that's an over-time evaluation of
8 higher quality; I won't say necessarily better.

9 Q. How do you determine that his scholarship is
10 better than Linda's?

11 A. Based on the reviews that -- over the years of
12 the committee. His teaching, I'd say that they're
13 roughly equivalent when it comes to teaching is my --
14 that's again my general impression. Service, Bob Bone
15 is probably high -- I would rate the quality of his
16 service above Linda's.

17 Q. And why is that?

18 A. He has -- until the COVID, again, we have to --
19 all bets are off when it comes to COVID. But up until
20 then he is at all or virtually all of the colloquia, all
21 of the drawing board luncheons, comes to lots of
22 conferences, at least the ones that I've been to, and I
23 try to go all of the colloquia and drawing board
24 luncheons or I did pre-COVID, and service on big,
25 important -- or just service generally on committees.

1 I don't know in terms of between the two
2 of them how I would evaluate them in terms of service to
3 the -- to the profession. I would say when it comes to
4 service to the profession I would put Linda above Bob on
5 that. And in terms of service to the students, I know
6 that Linda is actively involved with the students
7 because I've shared students with her and they've
8 mentioned her. So I think she -- and in that service
9 capacity she's -- I don't know about Bob, so at least
10 equivalent to Bob and perhaps higher quality.

11 Q. So based on what you just said, Professor
12 Mullenix might be higher in terms of service, they're
13 equal in terms of teaching, and Professor Bone is higher
14 in terms of scholarship?

15 MR. GIBSON: Misstates prior testimony,
16 objection.

17 Q. (By Mr. Walsh) Is that a fair summary of what
18 you said?

19 A. No, the service part of it, I don't know the
20 extent to which Bob does work with the bar and the
21 profession. So I would rank Linda ahead of Bob of what
22 I know when it comes to service to the profession. When
23 it comes to service on committees and things and service
24 around the law school I would rank Bob ahead of Linda.
25 I've seen her at -- she comes to some of these

1 functions, but colloquia and drawing board luncheons,
2 two of the important ones I think, particularly the
3 drawing board --

4 Q. You testified earlier that service outside of
5 U.T. and service within U.T. are equal?

6 MR. GIBSON: Objection, misstates prior
7 testimony. Objection, you interrupted the witness
8 before he could finish his prior answer so that the
9 record is incomplete.

10 A. I think service to the law school if I said
11 that they were equal, I don't think I said that, to
12 service to the profession, I don't think they're equal.
13 I think service to the profession counts, but service to
14 the law school is in my mind slightly more important
15 than service to the --

16 Q. (By Mr. Walsh) Is that stated anywhere in the
17 rules?

18 A. No, that's just -- that I think is my sort of
19 how I weigh things, like -- I think they're all --
20 they're both important.

21 Q. So you said that Professor Bone should be paid
22 somewhat more than Professor Mullenix but not perhaps as
23 much as he is paid more than her. Does that mean that
24 you agree Professor Mullenix is paid less than she
25 should be paid?

1 MR. GIBSON: Objection, misstates prior
2 testimony.

3 A. No. If anything, depending on the arrangement
4 that was made, Bob may be paid more than he should be
5 paid, but again, I need to know more about the
6 arrangements. I hesitate to make a judgment on that.
7 But if it turns out that the reason that his salary is
8 what it is is because he's had -- we were having to make
9 up for the fact that he wasn't able to bring over his
10 pension, maybe he deserves that because I've had my --
11 my pension has been accumulating since I started
12 teaching at U.T.

13 Q. (By Mr. Walsh) Well --

14 A. But I don't know the ins and outs of that but
15 that would be the -- my assessment, but I need to know
16 before I draw a strong conclusion about that.

17 Q. So you don't know what his special deal is?

18 A. No, or why it came about. These are all back
19 in the Sager years.

20 THE WITNESS: Want to take a quick break?

21 MR. WALSH: Sure, if you'd like to we can
22 definitely do that. How about ten minutes?

23 THE WITNESS: That's fine.

24 MR. GIBSON: Sounds great. Thank you.

25 THE VIDEOGRAPHER: We're off the record at

1 2:57 p.m.

2 (Recess taken from 2:58 p.m. to 3:09 p.m.)

3 THE VIDEOGRAPHER: We are back on the
4 record. The time is 3:09 p.m.

5 Q. (By Mr. Walsh) All right. So we were talking
6 about why Professor Bone should be paid more than
7 Professor Mullenix and we were talking about service.
8 Professor McGarity, is Professor Mullenix and Professor
9 Bone equal in service or not?

10 A. I would say that based on the participation at
11 colloquia, drawing boards, and generally things at the
12 law school, that I would rank Professor Bone slightly
13 ahead of Professor Mullenix.

14 Q. But you also agree that that is not stated in
15 the policies as being more important service than what
16 Professor Mullenix does, correct?

17 A. My recollection of the policies is that we list
18 the number of things that are service, so --

19 Q. The policies doesn't rank them as more
20 important, less important, weighted more heavily?

21 A. I don't recall from having read them, but I
22 don't think they do.

23 Q. And what if Professor Mullenix couldn't attend
24 things like drawing board because of classes?

25 MR. GIBSON: Objection, calls for

1 speculation.

2 A. Well, then she can't attend so it would be -- I
3 wouldn't expect her to be there.

4 Q. (By Mr. Walsh) Well, does the committee
5 discuss that fact when evaluating her service?

6 A. No, we -- no, it's a more general thing than
7 that. So we don't discuss what people's teaching
8 schedules are.

9 Q. All right. Professor McGarity, should you be
10 paid more than Professor Mullenix?

11 A. I think so, yes.

12 Q. Why is that?

13 A. I would talk about the -- mostly based on
14 quality of my scholarship. I think maybe my teaching is
15 slightly ahead of hers but not enough to make a great
16 deal of difference. I think for the same reason my
17 service is slightly ahead of hers. Mostly based on
18 scholarship. But you're asking -- this is a hard
19 question asking someone to evaluate their own
20 scholarship.

21 Q. Well, how do you know your scholarship is
22 better than Professor Mullenix's scholarship?

23 A. Well, my book, I've written several books that
24 have been published with major academic presses, two at
25 Harvard University Press, two at Yale University Press,

1 one at Cambridge University Press.

2 Q. But what does that have to do with the quality
3 of the book?

4 A. Well, those presses tend not to take books at
5 least based on the prospectus and they go through peer
6 review, the prospectus does, and even the manuscript
7 on -- yeah, I think virtually all of those, the ones
8 that I mentioned, the manuscript goes through a review
9 that they pay for. And again, this has to do with how
10 other people regard them, and I think people regard
11 Harvard University Press and Yale University Press and
12 Cambridge University Press as very prestigious places
13 for an academic to publish.

14 One of the books published by Harvard
15 University Press with Wendy Wagner as co-author won the
16 Hamilton Award and the Hamilton Award is given out by
17 the co-op. There's a committee of university scholars
18 that's put together to evaluate all of the books
19 published in the past year that are submitted at least
20 by University of Texas professors and it's -- they
21 select the best book and the best -- I think best
22 article over that period of time, and for at least the
23 year 2008 our book Bending Science won the overall --
24 the award and they were --

25 [Simultaneous speaking]

1 Q. Well, so if you're talking about the way a lot
2 of people outside of U.T. Law --

3 MR. GIBSON: Colin, if you could let
4 the -- if you could let Professor McGarity finish his
5 answer. He had not finished his answer. Objection for
6 the record. Mr. Walsh is interrupting the witness and
7 not letting him finish his answer so that the record is
8 intentionally incomplete and in my view Mr. Walsh is
9 trying to intentionally create a misrepresentation on
10 the record.

11 MR. WALSH: What a tiresome person you
12 are, Darren.

13 Q. (By Mr. Walsh) Professor McGarity, it sounds
14 like you're talking about the way it's perceived outside
15 of U.T. Law, your scholarship.

16 A. I can't tell you because I've not been present
17 at any meeting in which the committee has evaluated my
18 scholarship. So I can't tell you how the committee at
19 the law school regards my scholarship.

20 I would continue, though, that in terms of
21 my articles, I'm sure that it's somewhere of higher
22 quality than others. But at least twice my articles,
23 one book and one article, received the award from the
24 American Bar Association administrative law section for
25 the best scholarship published by an administrative law

1 scholar during the previous year, and only four other
2 people have received that award twice. One teaches at
3 Yale, one teaches at Stanford, one teaches at Harvard,
4 and the other teaches at Columbia.

5 Q. I think that sounds incredibly impressive. The
6 problem I'm having, though, is earlier you said that the
7 budget committee doesn't consider any of that, right?

8 A. Yes, and I don't think that the budget
9 committee did consider that. They certainly didn't
10 consider the Hamilton Award because they would have
11 determined my salary before I received the award. They
12 wouldn't have known that and I doubt they ever learned
13 about the ABA administrative law section award unless
14 they just -- I think maybe they put it on the law school
15 website or something like that, but I don't think they
16 would have considered that.

17 Q. And it's possible even if they knew about all
18 that they would have a completely different opinion of
19 your scholarship, right?

20 MR. GIBSON: Objection, calls for
21 speculation.

22 A. It's possible if they knew about it they would
23 have a different opinion? I hope not.

24 Q. (By Mr. Walsh) Well, I mean, but they could,
25 right?

1 MR. GIBSON: Objection, calls for
2 speculation.

3 A. I don't know.

4 Q. (By Mr. Walsh) I mean, let me think about this
5 for one second. Let me figure out how I want to ask
6 this question.

7 All right. So I want to take you to the
8 notes -- this is Exhibit 3, I believe -- from 2020. So
9 if you look here, this is a summary that you sent to
10 Dean Farnsworth regarding Professor Mullenix's
11 scholarship in 2020, in May of 2020.

12 A. Now, wait a minute. This is a memo I sent in
13 May of 2020? It would have been the scholarship in 2019
14 we're evaluating.

15 Q. Right. So May 15, 2020 you sent this to
16 Farnsworth.

17 A. Uh-huh.

18 Q. All right. So here, I want to go down to this
19 section. Did you read any of her scholarship this year
20 for this memo?

21 A. Let me -- can you scroll up a bit? Now scroll
22 down. I probably read the five-page preview of the Home
23 Depot case. No, I didn't because I put those quotes --
24 I rarely quote myself when I do that so I probably
25 didn't do that one. Let's see. Likewise, one of the --

1 the quotes with prevailing trope or whatever. Oh, I did
2 look at the box full of releases because I tend to
3 not -- that's a huge, big box that gets submitted and I
4 don't try to fork that over to some other faculty
5 member. So I reviewed that I'm sure.

6 Scroll up again. Let me see. I may have.
7 That chapter is familiar to me or it seems familiar to
8 me, so I may have reviewed that one.

9 Q. Okay. Wait, which one? The chapter you said?

10 A. The 27-page chapter on regulatory and judicial
11 consumer protection.

12 Q. How long have you worked with Professor
13 Mullenix?

14 A. You mean been on the same faculty?

15 Q. Yeah.

16 A. Well, for as long as she's been there. I was
17 there before she came, so many years.

18 Q. Are you aware that you spelled her name wrong
19 here?

20 A. I probably did. It does look wrong so I may
21 have done that, although with these crazy spelling
22 checkers they sometimes correct you when you don't want
23 to be corrected. There's one member of the faculty --

24 Q. Is Mullenix something that's usually auto
25 corrected?

1 A. I don't know, but I certainly wouldn't put it
2 past me to have misspelled her name without checking to
3 be sure.

4 I got something on my glasses here so I'm
5 going to take a second to clean them off. So. . .

6 Q. Do you think it's important to spell somebody's
7 name correctly?

8 A. Well, yeah, I suppose it's important, but it
9 gets --

10 Q. Why would it be important?

11 MR. GIBSON: I would ask, Colin, could you
12 please stop interrupting the witness in the middle of
13 his answer. I would request the witness to feel free to
14 finish your answer.

15 A. I was saying it's important because you don't
16 want to offend the person whose name you misspelled and
17 I apologize if I offended Linda.

18 Q. (By Mr. Walsh) It's a sign of respect. Would
19 you agree?

20 A. Yeah, but I don't think it indicates that I
21 disrespect Linda because I misspelled it in this
22 particular document.

23 Q. So here I want to -- so the whole reason I
24 brought this up, I want to point out this 39-page
25 article on the Arc of Procedure over Eran Chemerinski's

1 "Closing the Courthouse Door." Is that supposed to be
2 Erwin?

3 A. Probably.

4 Q. Have you ever heard of this guy?

5 A. Yeah, I've heard of Chemerinsky and I think it
6 is Erwin and I'm sure that's just -- again, I'm taking
7 these off my handwritten notes and I could have checked
8 them against the big binder that we get. But as I'm
9 trying to put this thing together, and it takes a long
10 time to put these memos together, I don't check every
11 spelling. I must say I'm embarrassed that I misspelled
12 Linda's last name, but I'm not particularly embarrassed
13 that I got Erwin Chemerinsky's first name wrong.

14 Q. So here do you remember who read this article?

15 A. No.

16 Q. The reader says, "The article provides lots of
17 examples and cases to support its thesis. Linda may
18 have been stretching to make a strong point. The reader
19 thought that it was 'a really horribly written piece' in
20 that it was overly critical of the Chemerinsky camp." I
21 guess my question is, why is that included in this
22 description of her --

23 A. Because that's what the reader -- that was the
24 reader's evaluation. We asked the reader or we -- yeah,
25 we asked the reader to give us the sort of bottom line

1 and that was that reader's bottom line and I quoted it.
2 I mean, I obviously wrote that down in my notes when I
3 was there.

4 Q. Well, what's striking to me about that is it's
5 not actually a comment on the substance of the article,
6 is it?

7 MR. GIBSON: Objection, misstates the
8 record.

9 Q. (By Mr. Walsh) Or the quality of the article.
10 It's saying it's horribly written because it takes a
11 critical view of a certain position.

12 A. Well, it said it was an overly critical review.
13 I'm just reporting. I was the -- reporting what was
14 said about that piece.

15 Q. Right. Do you even know whether this was a
16 review of Chemerinsky's book?

17 A. I know that the person who reported said it
18 was.

19 Q. And you didn't read this so you don't know if
20 that's accurate?

21 A. No, I do not know if that's accurate.

22 Q. Are there a lot of reviews of scholarship that
23 describe things as really horrible because of a position
24 they take?

25 MR. GIBSON: Objection, calls for

1 speculation.

2 A. No, I don't.

3 Q. (By Mr. Walsh) What --

4 A. I don't -- oh, go ahead.

5 Q. What makes something overly critical?

6 MR. GIBSON: Objection, calls for
7 speculation.

8 A. The person who made the evaluation would best
9 know that. I read that to say that you weren't
10 considering arguments on the other side, that you were
11 writing more of a polemic than an article. But that's
12 how I would read overly critical.

13 Q. (By Mr. Walsh) So here I want to now show you
14 the way this article was viewed by a law professor at
15 Georgetown. Is Georgetown a T14 school?

16 A. I'm sorry, is Georgetown a what?

17 Q. A T14 school.

18 A. Sometimes. Often I think.

19 Q. So here Professor Abernathy at Georgetown
20 University Law Center talks about what a great article
21 that was. Do you see that?

22 A. Uh-huh.

23 Q. It says, "I treasure your independent voice in
24 an era when most law professors seem like Stepford wives
25 of conformity." So here we have --

1 A. It looks like he must have been a mentor of
2 Linda.

3 Q. So here we have two strikingly different views
4 of the same article. One says it's really horrible
5 because it's overly critical of the Chemerinsky camp and
6 then the other one says it's great because it's an
7 independent voice.

8 A. Uh-huh. Yeah.

9 MR. GIBSON: Colin, I'd ask just as you've
10 asked previously, have you produced this document?

11 MR. WALSH: I've not produced it yet, no.
12 But it will be part of discovery supplementation.

13 Q. (By Mr. Walsh) But who's right, Professor
14 McGarity?

15 A. It sounds like it's a fairly divided camp and
16 someone who is on Chemerinsky's part of the camp thought
17 that her criticism -- somebody who was not in
18 Chemerinsky's camp thought that Linda's criticism was
19 good, and I don't know who -- whether the writer of
20 the -- or the person who I summarized here was in
21 another camp or this was just that person's impression,
22 given the read of the piece.

23 Q. Well, so how does the budget committee deal
24 with the fact that you could have polar opposite views
25 on the same piece of scholarship?

1 A. We deal with the information that we have
2 available to us and we do the best we can.

3 Q. Well, what does that mean, do the best you can?

4 MR. GIBSON: Objection, asked and
5 answered.

6 A. We evaluate, we depend on the members of
7 committee who are assigned the particular articles to
8 give their judgment on the quality of the article to
9 tell us what the article said and to give us a judgment
10 on it.

11 Q. (By Mr. Walsh) Well, would you say that this
12 review from the budget committee, whoever read this, was
13 an unbiased view?

14 A. Yeah. I have no reason to --

15 Q. How can you possibly say that in good faith,
16 Professor McGarity? A really horribly written piece in
17 that it was overly critical of the Chemerinsky camp. It
18 describes it as a review of a book which is not what the
19 article is.

20 MR. GIBSON: So what's the question?

21 Q. (By Mr. Walsh) How can you say this wasn't a
22 biased review of her scholarship?

23 MR. GIBSON: Objection, asked and
24 answered.

25 A. It's just a review. I have no reason to

1 conclude that it was biased. It looks -- it's critical.
2 It's definitely critical of Linda's piece as apparently
3 Linda's was of the Chemerinsky book or whatever,
4 whatever "Closing the Courthouse Door" is, if that's not
5 a book.

6 Q. (By Mr. Walsh) All right. So here it
7 describes it as a review of the book.

8 (Pause.)

9 All right. So given that, you talked
10 about how your scholarship was viewed very highly
11 outside of U.T. As we've just seen, Professor
12 Mullenix's scholarship can be viewed very highly outside
13 of U.T. but not well received within U.T. Do you agree?

14 MR. GIBSON: Objection --

15 A. I can't agree with that. I think there was
16 two -- two questions you asked me. Did you want to --

17 MR. GIBSON: Objection, compound question.
18 Objection, calls for speculation.

19 A. I could certainly agree that someone outside
20 U.T. could regard Linda's scholarship as of a higher
21 quality than someone at U.T. I will say that with
22 regard to the first half your question, the Hamilton
23 Award was inside U.T. That was made by a committee of
24 the University of Texas.

25 Q. (By Mr. Walsh) So why -- you said you can

1 certainly see why Professor Mullenix's scholarship could
2 be viewed more highly outside of U.T. Why is that?

3 A. I think there can be differences of opinion
4 about the quality of scholarship. I think we just saw
5 that.

6 Q. All right. Is that because any evaluation of
7 scholarship is going to be subjective?

8 A. As I mentioned, it's a matter of judgment and
9 judgment involves a certain amount of subjectivity, yes.

10 Q. All right. Should Professor Mullenix be paid
11 as much as Professor Westbrook?

12 A. In my opinion?

13 Q. Yes.

14 A. I think it's the judgment of the committee that
15 she shouldn't. In my opinion that's the same, I think
16 no.

17 Q. Why is that?

18 A. That's based mostly on scholarship, but
19 generally just the cumulative judgment of the committee.
20 I have not read much of Jay's scholarship, so I have
21 read some of Linda's, and so I don't have a lot to base
22 a personal judgment on. But I think I've agreed with
23 the committee's evaluations over the years, sometimes
24 that have ranked Jay above baseline or baseline plus
25 when they ranked Linda baseline, and I don't know if she

1 ever got a baseline minus. I don't think she's ever
2 gotten a below baseline, but -- so based on that I guess
3 I would say Jay should be paid more. His teaching is
4 outstanding. I don't know quite, without seeing the
5 numbers, how it compares with Linda, but she's a very
6 good teacher too.

7 Q. Should Professor Mullenix be paid the same as
8 Professor Rabban?

9 A. Paid the same, I don't know. Again, that's a
10 kind of judgment that is cumulative over the years as
11 each individual year we make that judgment. I don't
12 know whether she is paid more than -- or less than. If
13 you could show me the chart again I could see that.

14 Q. Professor McGarity, you've been on the budget
15 committee for over a decade. You must have an opinion
16 on whether or not Professor Mullenix should be paid the
17 same as Professor Rabban.

18 MR. GIBSON: Objection, that's harassing
19 the witness. It's not a question. You just said -- you
20 just made a statement. If you'd like to ask the witness
21 a question, please ask the witness a question.

22 Q. (By Mr. Walsh) Professor McGarity, is it your
23 testimony that in your decades on the budget committee
24 you do not have an opinion as to whether Professor
25 Mullenix should be paid the same as Professor Rabban?

1 A. No, I do have an opinion based on my decades.

2 Q. What is your opinion?

3 A. That I'd like to see the numbers. I think that
4 if Professor Rabban is paid more than Professor Mullenix
5 in that -- on that chart, then my opinion would be that
6 that reflects the judgment of the committee and that
7 would -- I would generally agree with the judgment of
8 the committee. I'm not sure that Professor Rabban is
9 paid more than Professor Mullenix.

10 Q. So I just want to ask you real quick to point
11 out how it's not circular to say I think Professor
12 Mullenix should not be paid as much as Professor Rabban
13 because she's not paid as much as Professor Rabban.

14 A. I did not --

15 MR. GIBSON: I'm sorry. Objection. I'm
16 not sure that's a question. What's the question?

17 MR. WALSH: It was a question, Darren.

18 MR. GIBSON: Objection, vague and
19 ambiguous. And the witness can try to answer what
20 appeared to be a statement to me.

21 A. Your original question was should she be paid
22 equal to Professor Rabban and I would be -- and I don't
23 think that's my judgment. I would like to know whether
24 she is or is not paid more or less than Professor
25 Rabban.

1 Q. (By Mr. Walsh) Professor Rabban is paid more.

2 A. He is paid more? Then that reflects the
3 judgment of the committee that over the years that
4 his -- some aspect of that overall evaluation exceeded
5 that of Professor Mullenix. I'm not --

6 Q. In your opinion which aspect --

7 MR. GIBSON: Could you please let the
8 witness finish his answer? Objection on the basis of
9 the fact that Mr. Walsh interrupted the witness before
10 he was finished.

11 A. As I was saying -- I've lost my train of
12 thought what I was going to say. I'll I guess stick
13 with what I said, that based on the cumulative judgment
14 of the committee over the years that's how things have
15 worked out if that's how the -- if that's what the
16 numbers show on that chart.

17 Q. (By Mr. Walsh) But it's not a reason, though;
18 do you agree? Like saying because he's paid more he
19 should be paid more doesn't explain why he's paid more.

20 MR. GIBSON: Objection. Go ahead.

21 A. That's not what I said. I didn't say because
22 he's paid more he should be paid more. I said because
23 on that chart -- because he's paid more on that chart,
24 or that's what the chart says, that that reflected the
25 judgment of the committee over the years. And based on

1 that judgment of the committee, I am inclined to say
2 that he should be paid more than Linda at this
3 particular juncture.

4 Q. (By Mr. Walsh) All right. Professor McGarity,
5 I need you to justify that answer. Why should she not
6 be paid as much as Professor Rabban?

7 MR. GIBSON: Objection, asked and
8 answered. Objection, misstates prior testimony.

9 A. Over the years we've made judgments and made
10 recommendations to the dean about the quality of
11 scholarship, service, and teaching, and over the years,
12 at least as of this particular juncture, this stage,
13 that cumulative judgment has wound up with David being
14 paid more than Linda.

15 Q. (By Mr. Walsh) Which one of -- which one of
16 those factors or do all of them point towards Professor
17 Rabban getting paid more than Professor Mullenix?

18 A. It may have been different factors in different
19 years. I don't know. I mean, I. . .

20 Q. Well, sitting here right now, this year you're
21 on the budget committee, should Professor Mullenix be
22 paid the same as Professor Rabban?

23 A. Should she get the same raise or are you saying
24 should she be paid the same? You said be paid the same
25 and the answer is I wouldn't say that based on one

1 year's performance on either of them. That's what we're
2 looking at this year on the budget committee.

3 Q. So should she get the same raise?

4 A. We have not come to David Rabban yet so I can't
5 say.

6 Q. All right. So you don't know. So it could be
7 any of these factors, teaching, scholarship, service,
8 that in any given year you think Professor Rabban is
9 better than Professor Mullenix?

10 MR. GIBSON: Objection; misstates prior
11 testimony, asked and answered.

12 A. Yes, I think that's true. In any given year it
13 could be any one or all three factors.

14 Q. (By Mr. Walsh) So why was Professor Rabban
15 paid more initially than Professor Mullenix?

16 MR. GIBSON: Objection, misstates prior
17 testimony.

18 A. What do you mean by initially?

19 Q. (By Mr. Walsh) Well, I mean, if they
20 receive -- if they're both rated baseline or you say
21 that over the years they should be receiving the same
22 pay or that they're -- one of the factors is more
23 important than the other, at some point Professor Rabban
24 moved ahead of Professor Mullenix. Is that right?

25 MR. GIBSON: Objection, misstates prior

1 testimony.

2 A. I don't know that to be the case. I'm trying
3 to remember when --

4 Q. (By Mr. Walsh) He's always been paid more than
5 Professor Mullenix.

6 A. I can't remember when he joined the faculty.
7 Did he join the faculty before Linda?

8 Q. I don't have an answer for you.

9 A. I don't know.

10 Q. It doesn't matter.

11 A. If we start with that first starting salary and
12 then things move from there. My starting salary at the
13 University of Texas was \$30,000. I thought it was
14 terrific. It was a great raise over what I was getting
15 at the University of Kansas, but that's kind of the
16 starting point from which judgments are made to bump my
17 salary up or leave it the same. I don't think we've
18 ever made a judgment that somebody's salary should be
19 bumped down. That's never happened.

20 Q. So then why shouldn't Professor Mullenix's
21 salary be bumped up?

22 MR. GIBSON: Objection, vague and
23 ambiguous.

24 A. It may well be in any given year based on the
25 judgment. It will go up if there's money to be paid and

1 she's evaluated at baseline, then her salary will be
2 bumped up.

3 Q. (By Mr. Walsh) What about Professor Levinson,
4 should Professor Mullenix be paid as much as Professor
5 Levinson?

6 A. Again, based on the cumulative judgment of the
7 committee, if he turns out above her in salary on that
8 chart, then I would say my answer is exactly the same,
9 that if he's above her he should -- based on the
10 judgment of the committee he should be paid more.

11 Q. What reason should Professor Mullenix be paid
12 less than Professor Levinson?

13 MR. GIBSON: Objection, asked --

14 Q. (By Mr. Walsh) What reason?

15 MR. GIBSON: Objection, asked and
16 answered.

17 A. That over the years her -- she was not
18 evaluated or the budget committee didn't recommend as
19 high a raise for her in some years so that the total
20 over all of the years is that Professor Levinson wound
21 up being paid more.

22 Q. (By Mr. Walsh) All right. See, once again you
23 just did that thing where you say because he's paid
24 more -- because we determined that he should be paid
25 more he's paid more. That doesn't tell me why, though.

1 A. Oh.

2 MR. GIBSON: Objection. There's no
3 question on the table. Colin, if you could ask
4 objection -- I mean ask a question.

5 Q. (By Mr. Walsh) So why does the budget
6 committee determine that Professor Levinson should be
7 paid more than Professor Mullenix?

8 MR. GIBSON: Objection, misstates his
9 prior testimony.

10 A. In any given year the budget committee will
11 make a recommendation based on their evaluation in that
12 particular year. So in any particular year if they
13 evaluate Professor Levinson more highly than Professor
14 Mullenix, they will -- that represents the judgment of
15 the committee that he should be paid more. In any given
16 year it may well be that they would evaluate the work of
17 Professor Levinson and Professor Mullenix and determine
18 that Professor Mullenix should get a greater bump-up or
19 increase in salary. Over the years as those average out
20 Professor Levinson has apparently gotten more bump-ups
21 or at least bump-ups in greater amounts than Professor
22 Mullenix. And I --

23 Q. (By Mr. Walsh) Professor McGarity, as you sit
24 here today, in your opinion should Professor Mullenix be
25 paid the same as Professor Levinson?

1 MR. GIBSON: Objection, asked and
2 answered.

3 Q. (By Mr. Walsh) I'm not asking about the budget
4 committee determination. I'm asking in your view if it
5 was just you making this decision, would you pay
6 Professor Mullenix as much as --

7 A. I haven't --

8 MR. GIBSON: Objection, asked and
9 answered.

10 A. We've not come to Sandy Levinson yet so I can't
11 tell you what I think.

12 Q. (By Mr. Walsh) Professor McGarity, how can you
13 possibly know that you haven't come to Sandy Levinson
14 yet? You couldn't even remember who you talked about on
15 Friday.

16 MR. GIBSON: Excuse me. Colin, that is
17 becoming harassing and abusive and it's really
18 disrespectful to this witness. I would ask that you
19 withdraw your question and ask a respectful question of
20 the witness. It's really unbecoming.

21 Q. (By Mr. Walsh) Professor McGarity, if you
22 can't remember who you even talked about on Friday how
23 can you possibly know who's already been evaluated?

24 A. Because I know that we tend to evaluate people
25 in terms of the years out of law school and Sandy is way

1 out there in terms of years out, and I am pretty
2 confident that we haven't -- I haven't read something
3 from Sandy this year so I can't say with dead absolute
4 certainty, but I'm pretty sure that we haven't looked at
5 Professor Levinson. If we have looked at Professor
6 Levinson I don't remember that evaluation well enough
7 because it would have been far enough in the past so
8 that I couldn't tell you, but I'm pretty sure we have
9 not looked at Professor Levinson yet.

10 Q. Well, so you were just evaluated on Friday and
11 Professor Levinson doesn't have that many more years on
12 you.

13 A. But it was --

14 Q. So does that mean he's coming up this week?

15 A. It probably means we'll get to him the next
16 meeting. It almost certainly means. We've only got
17 about six or seven more to go.

18 Q. And you didn't read any of his scholarship?

19 A. Not this year.

20 Q. All right. So I forget, what was your answer
21 to the question, is you sitting here if you were the
22 only one to decide salary at U.T. Law why would you pay
23 Professor Levinson more than Professor Mullenix?

24 MR. GIBSON: Objection, misstates prior
25 testimony. Objection, asked and answered. Objection,

1 calls for speculation.

2 A. We're talking about overall pay and not the
3 raise for this past year?

4 Q. (By Mr. Walsh) Right.

5 A. For 2020. Again, my answer is exactly the
6 same. Over the years cumulatively our evaluations of
7 Professor Levinson have exceeded our evaluations of
8 Professor Mullenix to the extent that those salaries are
9 different.

10 Q. Do you remember why that was?

11 A. No, not -- again, it's cumulative.

12 Q. So if you don't remember why Professor Levinson
13 is being paid more or evaluated higher, could it be
14 because Professor Mullenix is a woman and Professor
15 Levinson is a man?

16 MR. GIBSON: Objection, calls for
17 speculation.

18 A. I feel very confident that it's not because of
19 that because I've been on the budget committee nearly
20 all of those years and that has not been a reason for
21 evaluating the scholarship, service, and teaching.

22 Q. (By Mr. Walsh) Well, do you think they would
23 have said it out loud if it was?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. I don't know if somebody was discriminating
2 based on sex whether they would say it out loud or not.

3 Q. (By Mr. Walsh) Have you ever heard any
4 misogynistic comments from faculty members at U.T. Law
5 in your 40 years?

6 A. I'm trying to think. Not that I can think of.

7 Q. All right. Have you ever seen any sexism at
8 U.T. Law in your 40 years?

9 A. We have to go back probably slightly before my
10 40 years or it may be part of when I was teaching.
11 Yeah, there was something I would characterize as
12 sexism. There was not an equivalent access to restrooms
13 for men and women. I do recall that. That was back in
14 the early years and it may have been when I was a
15 student, but I think it may not have been that different
16 when I first started.

17 Q. Should Professor Mullenix be paid as much as
18 Professor Hu?

19 A. Again, my answer is exactly the same, is if
20 the --

21 Q. Well, let me stop you right there and ask a
22 follow-up question, which --

23 MR. GIBSON: I would object to the extent
24 that the witness was interrupted from answering his
25 question so the record is incomplete and intentionally

1 incomplete based on Mr. Walsh interrupting the witness.

2 Q. (By Mr. Walsh) Professor McGarity, you said it
3 was going to be the same answer so I thought I would
4 head this off and ask my follow-up question instead of
5 just letting you repeat yourself over and over.

6 So let me follow up then. Which of the
7 factors would entitle Professor Hu to more pay than
8 Professor Mullenix?

9 A. Well, it could be different factors in
10 different years as they accumulated over the years. I'm
11 trying to think if there's anything in particular.
12 Again, it's the judgment of the committee in each year
13 and that aggregates and accumulates over the years. So
14 it may well be, in fact almost certainly was, the case
15 in a few years that Professor Mullenix was regarded more
16 highly than Professor Hu when it came to recommending
17 salary increases because there were some fallow years
18 early on in Professor Hu's scholarship but then he
19 published some outstanding articles in other years. So,
20 again, it would be a cumulative thing, so my answer is
21 again pretty much the same.

22 Q. Have you ever recommended an equity raise for
23 Professor Mullenix?

24 A. Me personally? No.

25 Q. Yeah. Has anyone on the budget committee --

1 A. I am --

2 Q. -- ever recommended an equity raise for
3 Professor Mullenix?

4 A. You know what, I may have to take that back,
5 what I just said. No, if you're asking just an equity
6 raise for equity -- for purposes of adjusting things for
7 equity, I don't think I have made a recommendation for
8 Linda Mullenix nor have I for any other faculty member.
9 Now, you ask anybody else. Not that I know of.

10 Q. So what were you thinking of that made you
11 originally think you might have to change your answer?

12 A. I think at one point when we were asked about
13 the faculty development initiative I may have. I just
14 don't recall for sure. But I remember thinking that
15 I -- thinking if she should be included, but I don't
16 know that I went forward with that or not. Probably
17 did. This would have just been a kind of ballot that
18 the -- that the dean asked us to give a list of six
19 people or eight people, I can't remember, that we
20 thought should be on the -- in the faculty development
21 initiative. That was supposed to be a secret vote so I
22 just told you what my vote was I guess.

23 Q. Do you remember anybody else that you voted for
24 for that?

25 A. Oh, I think I -- I think there were two of

1 them, two rounds of this. I'm sure I can't remember all
2 of them.

3 Q. Well, can you remember any of them besides
4 Professor Mullenix?

5 A. Sure, sure. I can remember Cary Franklin,
6 Wendy Wagner, I think Joey. And again, we're probably
7 accumulating across two of these. The first time I
8 think we were looking at younger people, the retention
9 risks, so that would include Wendy, probably David
10 Rabban, definitely Jay Westbrook. Let me think of
11 others. Lynn Baker, Jennifer Laurin. Probably Michele
12 Dickerson. If you want to put the list I can maybe
13 think of others. I think it was just eight or nine over
14 the years, maybe 10 or 11. I don't know how many I just
15 listed but those come to mind.

16 Q. Actually that's a really good idea. Give me
17 one second.

18 (Pause.)

19 A. I thought of another one. I think Melissa
20 Wasserman was on that -- would have been on one of
21 those. This is probably the earlier one. Angela
22 Littwin, that's who I was trying to think of.

23 Q. You said Littwin and Wasserman?

24 A. Yeah, I think. I'm not sure about Melissa
25 because she wasn't around I think when we did the first

1 round, so you might take her off the list. I'm not
2 positive about that. Angela Littwin, though, I'm pretty
3 confident would have been on my list.

4 Q. So here's the list of the people who were
5 awarded that. Let me ask you --

6 MR. GIBSON: Colin, I'm sorry to
7 interrupt, but I feel like you have previously labeled
8 Exhibit 5 and I think this should be Exhibit 6. I just
9 don't want us to have a messed-up record.

10 MR. WALSH: Hold on. Oh, I did. Good
11 catch. Okay.

12 Q. (By Mr. Walsh) All right. It should be
13 properly labeled now in the screen. Here's all the
14 people that did receive FII funds the second round, but
15 it also includes everybody who got it the first round.

16 A. Okay. That's helpful.

17 Q. Because all the people that got it the first
18 round also got it the second round.

19 A. Okay. Are you asking me who -- if he was
20 around when we were making the recommendations, I
21 definitely would have put Steve Vladeck on my list.

22 Q. So let me ask it this way. Is there anybody on
23 this list that you voted for -- or is there anybody
24 who's not on this list that you voted for? So we know
25 that Professor Mullenix was one. Is there anybody else

1 like that?

2 A. I got to look at the list real carefully then.
3 Can you make it a little bigger for me?

4 Q. Yeah, I'm going to make the names bigger.

5 A. Yeah, that's what I want -- oh, that's good.
6 That's good. The only one that I might -- and again, I
7 don't remember who I put on that list, it might have
8 been on my list that didn't wind up here, would be Sean
9 Williams. I'm very impressed with -- he doesn't write a
10 lot of articles but the articles he writes I think are
11 of high quality, so I -- and his service is terrific and
12 his teaching is regarded better than average. I might
13 have included Sean Williams on my list that didn't make
14 this list of the -- this is based on our -- the
15 cumulative sort of rankings of all of the members of the
16 committee.

17 Q. Oh, just because you expressed curiosity, I'm
18 going to go ahead and point out here's the special deal
19 that Bone got. 12,125 is the portion of -- that BU
20 would contribute to his retirement account each year, or
21 the difference between what U.T. does and what BU does.

22 A. Oh, that's interesting. I didn't know what the
23 deal was. I'm not -- I mean, I take your word for it.
24 I don't know that that's the case or not, but it does
25 say additional compensation.

1 Q. So if you look down here, you're paid 359 and
2 if you don't take the \$12,000 for Professor Bone out you
3 get 365. So he's still paid a little bit more. Does
4 that seem right?

5 A. Oh, I'm not in the best position to judge that.
6 Other people evaluated my scholarship and Bob's
7 scholarship and that's how they came out. And again,
8 you take the 12,000 out, he's paid more than me, I guess
9 that represents the judgment of the committee over the
10 years.

11 Q. And you agree with it, you think that's right?

12 MR. GIBSON: Objection, asked and
13 answered.

14 A. I said it's not for me to say. If that's the
15 way the committee came out, I can accept that.

16 Q. (By Mr. Walsh) So you said that this was done
17 by secret ballot. What happened to the ballots after
18 you cast them?

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. I just turned mine in on a piece of note paper
22 off a legal pad. I just gave them to the dean. I don't
23 know what the dean did with them.

24 Q. (By Mr. Walsh) Okay. So it was all done by
25 paper?

1 MR. GIBSON: Objection, calls for
2 speculation.

3 A. Yes, we were asked to turn in to him a piece of
4 paper with those -- with our rankings on them. And as I
5 recall, he said in rank order so we did it that way.

6 Q. (By Mr. Walsh) And it was paper both times,
7 both rounds?

8 A. I don't have a strong enough memory of the
9 first round. I do have a pretty strong memory of the
10 second round.

11 Q. Since we're talking about this, there was a
12 decision made by the budget committee not to reveal that
13 a second round of faculty investment initiative funding
14 had been released by the university. Is that right?

15 MR. GIBSON: Objection, misstates prior
16 testimony.

17 A. I don't recall a decision made to that effect.

18 Q. (By Mr. Walsh) Well, was there a letter or
19 memo ever sent to the faculty listing all of these
20 people as receiving faculty investment initiative
21 funding in 2018?

22 A. I didn't write one. I don't recall having seen
23 one.

24 Q. All right. Did Dean Farnsworth talk to you and
25 the budget committee about whether to reveal that there

1 was a second round of faculty investment initiative
2 funding?

3 A. Let me think about that. I don't remember him
4 saying don't reveal that there's been a second round.

5 Q. You don't remember if the budget committee --
6 well, let me ask it this way. Do you remember if the
7 budget committee decided that this might make the
8 faculty upset and so it decided not to reveal it?

9 A. I don't recall making that decision at all.

10 Q. Do you think that if the faculty knew about
11 this they would be upset?

12 MR. GIBSON: Objection, calls for
13 speculation.

14 A. Well, that also states faculty in the plural.
15 My answer would be probably some people on the faculty
16 would be upset. I think lots of people on the faculty
17 wouldn't have been upset. But that's -- again, I'm
18 speculating about that. That's just my impression.

19 Q. (By Mr. Walsh) Who do you think would have
20 been upset on the faculty?

21 MR. GIBSON: Objection, calls for
22 speculation.

23 A. I can't say for sure. I think the only people
24 who didn't get the raise, some of them might have been
25 upset. I can't name names. It's just pure speculation,

1 really.

2 Q. (By Mr. Walsh) Go ahead and speculate away.
3 Name names. Who do you think would be upset by
4 discovering they were not a recipient of the FII funds?

5 MR. GIBSON: Objection, calls for
6 speculation.

7 A. I hate to even speculate. That might be doing
8 somebody a disservice.

9 Q. (By Mr. Walsh) All right. So if Dean
10 Farnsworth testified that the budget committee was
11 consulted about whether to reveal these funds and the
12 determination was not to, is there any reason to think
13 he would be misremembering?

14 MR. GIBSON: Objection, calls for
15 speculation.

16 A. Are you saying would I have any basis for
17 saying he was misremembering?

18 Q. (By Mr. Walsh) Yeah.

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. No, I don't have any basis for saying he would
22 be misremembering.

23 Q. (By Mr. Walsh) Okay. Now, you testified that
24 when there's dislocation due to raises or money given
25 for retention bonuses that sometimes the budget

1 committee talks about making equity raises. Has the
2 budget committee discussed any equity raises due to
3 dislocation because of the faculty investment
4 initiative?

5 MR. GIBSON: Objection, misstates prior
6 testimony.

7 A. Yes.

8 Q. (By Mr. Walsh) All right. What has the
9 faculty -- what has the budget committee discussed?

10 A. In the years subsequent to the first time this
11 went into effect we talked about people who didn't get
12 this that were good-performing faculty members as
13 they -- now these raises tended to separate folks that
14 we should -- we thought about, well, when we bump
15 somebody up we should bump them up a little more, given
16 our annual amount of budget that we have to work with.
17 So yeah, we did talk about that.

18 Q. And who specifically was talked about in
19 connection with that?

20 A. I don't recall anyone in particular. I think
21 that we just sort of made it a general thing, and we
22 probably did talk about it in particular with particular
23 people but I don't recall who those were.

24 Q. Was it more than one person?

25 A. Yes, I think it was more than one.

1 Q. Should Professor Powe be paid more than
2 Professor Mullenix?

3 A. Again, based on the cumulative judgment of the
4 committee over the years, perhaps so. But on any given
5 year, possibly not.

6 Q. Why possibly not?

7 A. Because he has --

8 MR. GIBSON: Objection, calls for
9 speculation.

10 A. There are years where Professor Powe hasn't
11 published. He has a kind of way that he writes these
12 really spectacular books every six or seven years and we
13 to some extent take that into account. But if there's
14 been two or three relatively fallow years, that's going
15 to count against him and he's going to wind up with a
16 below -- maybe not below baseline but a baseline minus
17 evaluation, whereas Linda might in those years be
18 getting a baseline or a baseline plus or above baseline
19 evaluation in that year and therefore would do better in
20 any particular year. But over the years if his salary
21 is above hers at the moment, it's a cumulative thing and
22 not based on any given year.

23 Q. (By Mr. Walsh) All right. Should Professor
24 Mullenix be paid the same as Professor Peroni?

25 MR. GIBSON: Calls for speculation.

1 A. The answer is basically the same. Depending on
2 the evaluations over the years, she should if
3 cumulatively that's where she came out or he came out as
4 of this year.

5 Q. (By Mr. Walsh) Why is that?

6 A. Because I think people should be paid what as
7 their -- their pay should reflect the evaluations of the
8 budget committee over the years.

9 Q. All right. So it sounds like you really trust
10 the system quite a bit. Is that correct?

11 A. That's correct.

12 Q. Why? I'm sorry, that's a why.

13 A. That's the question, why? Well, over at least
14 20 years that I've been on the budget committee I've
15 seen it operate and I think it works very well.

16 Q. Is that because you're on the committee?

17 A. It's because I'm on the committee that I was
18 able to observe it over a 20-year period, yes.

19 Q. How has the budget committee changed between
20 Farnsworth and Sager besides the number of committee
21 members?

22 A. Farnsworth comes to us for virtually any pay
23 kind of issue that comes before him, be it retention
24 because somebody made an offer to one of our faculty
25 members, or bringing in the laterals, as we mentioned,

1 and Sager never did that.

2 Q. Is that a good thing, bad thing?

3 A. Yes, I can unequivocally answer that yes in my
4 view.

5 Q. What --

6 [Simultaneous speaking]

7 A. I'm sorry?

8 Q. So one of the issues with Dean Sager --

9 MR. GIBSON: I think -- can we just
10 clarify what you think, whether that was a good thing or
11 a bad thing? You guys were talking over each other.
12 Just ask Professor McGarity, can you clarify whether you
13 think that was a good thing or a bad thing?

14 A. I think it was a good thing the way we changed
15 the -- or the way the dean changed between Sager and
16 Farnsworth when it comes to requesting the advice of the
17 budget committee with respect to lateral hires and with
18 respect to retention of faculty.

19 Q. (By Mr. Walsh) Now, with lateral hires why
20 does he go to the budget committee instead of the
21 appointments committee?

22 MR. GIBSON: Objection, calls for
23 speculation.

24 A. Because it has -- he just comes to us with
25 respect to salary, not with respect to whether we should

1 hire or not. That decision has already been made by the
2 time it comes to us, the faculty has voted on it.

3 Q. (By Mr. Walsh) Okay. So one of the issues
4 with Dean Sager was that he was giving out large sums of
5 money without informing the faculty, correct?

6 A. That's my understanding, yes.

7 Q. Now, it seems to me that Dean Farnsworth is
8 doing the same thing except he confers with the budget
9 committee before giving out large sums of money. Would
10 you agree with that?

11 A. No, I wouldn't. We're not talking large sums
12 of money like we were with Sager, forgivable loans --

13 Q. Well, does Sager come to the budget committee
14 regarding housing allowances?

15 A. No, he does not come to the budget committee.

16 Q. What about relocation allowances?

17 A. No. Those are all set where the faculty voted
18 on ranges for the -- that the dean could use for those.

19 Q. What about big raises, like \$43,000 to
20 Professor Albert?

21 A. He did come to the budget committee to meet the
22 salary offered by whatever university was offering --
23 offering Richard that money and over -- and cumulatively
24 that's a lot of money, but it's not like it's this
25 200,000 forgivable loan kind of thing that was going on

1 in the Sager administration, as I understand it. I
2 wasn't involved in it. I definitely, as a member of the
3 budget committee and the chairman of the budget
4 committee, wasn't consulted about those.

5 Q. Okay. So do you think that Dean Farnsworth is
6 more transparent than Dean Sager?

7 A. Yes.

8 Q. Why is that?

9 A. Because he comes to the budget committee,
10 because he makes available every faculty member's salary
11 to anybody on the faculty. For a few years we actually
12 sent it out as a memo to be transparent about it. In
13 more recent years it's just if you want to know, come to
14 the dean's office and you can see it. But that's much
15 more transparent.

16 Q. How can you say that, Professor McGarity?
17 Because I just showed you something about Bob Bone's
18 salary that you didn't know, so how can you say that he
19 makes everybody's salary available?

20 A. Well, I've never gone to look. That
21 particular -- I mean, the whole -- when we -- after the
22 Sager years we decided to -- I'm trying to remember what
23 word it is. It wasn't disaggregated. What's the word
24 you use for combining them all in and then playing it
25 out on an annual basis. We annualized some of these

1 forgivable loans, right, and I never was clear on
2 exactly what the -- how that worked and the numbers on
3 it.

4 So when you showed me that piece of
5 information, I'm on the budget committee and I don't
6 recall having seen that -- that number for Bob and I
7 still don't know that that reflects what he didn't get
8 from BU when he came over. That's what you tell me and
9 I don't know it not to be true either.

10 Q. Should Professor Forbath be paid more than
11 Professor Mullenix?

12 A. My answer is the same. If that issue --

13 Q. I'm asking your opinion.

14 MR. GIBSON: Objection.

15 Q. (By Mr. Walsh) I'm not asking what the budget
16 committee's determination is. I'm asking in your
17 opinion, Professor McGarity, should Professor Forbath be
18 paid more than Professor Mullenix?

19 MR. GIBSON: Objection, asked and
20 answered. Objection, the witness was interrupted when
21 he was trying to provide his answer.

22 A. If that reflects the cumulative judgment of the
23 budget committee over --

24 Q. (By Mr. Walsh) Professor McGarity, I'm asking
25 about your opinion. I'm not asking what the budget

1 committee's cumulative judgment --

2 A. That would be my opinion because --

3 Q. [Indiscernible] who has been working at the law
4 school alongside Professor Forbath for years to answer
5 this question as well as working alongside Professor
6 Mullenix for years to answer this question. Do you
7 think that Professor Forbath, based on your observations
8 in working with him, should be paid more than Professor
9 Mullenix?

10 MR. GIBSON: Objection, asked and
11 answered. I would again request for the sake of the
12 record and for our court reporter that Mr. Walsh stop
13 interrupting the witness when he is trying to answer the
14 question and when he doesn't like the answer he's
15 receiving.

16 A. I lost my train of thought. Apart from my
17 experience on the budget committee, I have no basis for
18 having an opinion or I haven't tried to form an opinion
19 about whether Professor Forbath should be paid more than
20 Professor Mullenix.

21 Q. (By Mr. Walsh) And what about Professor
22 Steiker, should he be paid more than Professor Mullenix?

23 A. Professor who?

24 Q. Steiker.

25 A. Steiker. My answer is the same. If that

1 reflects the cumulative judgment of the budget committee
2 over the years, then I think he should.

3 Q. Why is that? What have you seen from Jordan
4 Steiker that makes him worth more than Professor
5 Mullenix?

6 MR. GIBSON: Objection, misstates prior
7 testimony.

8 A. What I have told you before, if that reflects
9 the -- I don't know that he is or isn't, so I -- because
10 I have to see the numbers to know that for sure because
11 I know Professor Mullenix is paid well. But if that --
12 to the extent that that reflects, and it does. To the
13 extent that it's higher than her salary, it reflects the
14 cumulative judgment of the budget committee, which as I
15 told you on a number of occasions I trust and therefore
16 I would agree.

17 Q. (By Mr. Walsh) Should Professor Mullenix and
18 Professor Silver be paid the same?

19 A. Same answer.

20 Q. And what about Professor Wickelgren and
21 Professor Mullenix, should they be paid the same?

22 A. That one actually may be a little different
23 because Abe came in with this spectacular deal that had
24 him very high up, and he hasn't been on the faculty long
25 enough to necessarily reflect the collective judgment of

1 the budget committee. So on that one I would have to
2 say I -- I don't have a clear opinion about. I will say
3 that I think that Professor Wickelgren started at a very
4 high salary that was above his cohort by a considerable
5 distance, and whereas I don't think the budget committee
6 has penalized him for that as we make these baseline,
7 above baseline, minus baseline. I think his current
8 salary reflects that initial huge beginning salary.

9 Q. So to your knowledge, do tenured law faculty
10 create course syllabi each year?

11 A. We're supposed to. That's what the university
12 regulations require us to do.

13 Q. Actually you know what, this might be better.
14 Let me just do this. So I want to show you paragraph
15 No. 8. It starts with "Professor Mullenix's academic
16 responsibilities include." Do you see where?

17 A. Yes.

18 Q. All right. Would this be a good description of
19 all tenured law faculty?

20 A. Let me read it.

21 (Witness reviews document.)

22 Not all of those are something that I
23 would consider a responsibility of the faculty.

24 Q. Which ones would you take out?

25 A. Engaging in continuing legal education. If

1 you're talking about taking CLE courses, if you're a
2 member the bar you need to do that, but you don't have
3 to be a member of the bar to be on the faculty.

4 Q. Oh, okay.

5 A. Let me see, there's another one. Participating
6 as a speaker or conference at academic and professional
7 meetings, I think that's something that's highly
8 recommended but not necessarily required. The rest of
9 them I think is something that we expect to see in our
10 tenured professors.

11 MR. WALSH: Well, if nobody objects I'd
12 like to go ahead and take a short ten-minute break.

13 THE WITNESS: I would like that.

14 MR. WALSH: Let's go off the record.

15 (Recess taken from 4:32 p.m. to 4:49 p.m.)

16 THE VIDEOGRAPHER: We are back on the
17 record at 4:49 p.m.

18 Q. (By Mr. Walsh) All right. Thanks for coming
19 back after a short break, Professor McGarity. What I
20 want to talk about now is the budget committee that took
21 place in spring of 2018. You were not chair of that
22 committee. Is that right?

23 A. When you say 2018, is that 2018-19, or '17 to
24 '18?

25 Q. '17 to '18, the one that Linda --

1 A. I think I was not -- I was not the chairman
2 that year is my recollection, that's right.

3 Q. All right. Was it Professor Baker?

4 A. I think it was.

5 Q. All right. So I want to just ask -- so here is
6 something. So this is going to be Exhibit No. 7. I'll
7 show you what it is. I just want to make sure we're
8 talking about the same thing. So this is the 2017 to
9 2018 Guidelines for Annual Review of Faculty.

10 A. Okay.

11 Q. So would this be the guidelines that would be
12 used to set the fall 2018 salaries?

13 A. No, this is the one for the university. So it
14 would be the guidelines for determining --

15 Q. Well, this is the same sort of thing from
16 before, so 2017 to 2018?

17 A. That would be where we made the determination
18 whether they met expectations, exceeded expectations, or
19 didn't meet expectations. That's what that memo is
20 about.

21 Q. Right. So here I just want to show you. This
22 looks like all the submissions from the faculty members.
23 Let's see if we can get through all of these. These are
24 all student evaluations.

25 A. Oh, okay.

1 Q. So then you have like this. Does this look
2 like the binder that's provided to you?

3 A. Uh-huh.

4 Q. Who provides this binder?

5 A. Sylvia Hendricks when I was chairman. I think
6 every year I was chairman it was Sylvia Hendricks.

7 Q. All right. So do you remember -- so now I want
8 to show you what I'm going to mark as Exhibit No. 8. Do
9 you remember who you read -- what scholarship you read
10 in 2017?

11 A. No.

12 Q. 2018?

13 A. I don't remember off the top of my head. I
14 would at least --

15 Q. What was your opinion of Professor Baker --

16 [Simultaneous speaking]

17 A. You would have -- I'm sorry, you would have in
18 that production my what they call "Tom reads" and that
19 would be the ones that I evaluated.

20 Q. What was your opinion of Professor Baker as the
21 chair of the budget committee?

22 A. I thought she did a decent job.

23 Q. How come she hasn't been chair since?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. I have no idea.

2 Q. (By Mr. Walsh) Does Dean Farnsworth just
3 select the chairs?

4 A. That's my understanding.

5 Q. I mean, is that how you've been selected?

6 A. As far as I know, perhaps in conjunction with
7 Bobby Chesney. He may consult with Bobby, but he
8 doesn't -- he makes the selection.

9 Q. All right. So this is the summary that was
10 sent to Dean Farnsworth of the committee of the raise
11 recommendations and committee comments. Do you ever see
12 this document if you're not the chair?

13 A. First time I've seen it as far as I can recall.

14 Q. Okay. All right. So now I want to show you
15 Exhibit No. 9. All right. It's going to be Exhibit
16 No. 9. All right. So this is the salary range from
17 2017 with the increase for the 2018 salaries. So if you
18 look here, you see Professor Bone got \$10,000, so did
19 you, so did Professor Westbrook, Sager got 3, Rabban got
20 10. And then you come down here to Mullenix who got
21 1,500. Do you remember the year that Professor Mullenix
22 got a \$1,500 salary increase?

23 A. I don't remember that. It looks like at least
24 that was the case in 2017-18.

25 Q. Right. For the 2018-2019 year?

1 A. The raise for that year, yes. It was based on
2 the 2017 performance.

3 Q. Right. Do you remember anything about
4 Professor Mullenix's performance from 2017 that would
5 indicate that she would get a \$1,500 raise?

6 A. No.

7 Q. So it might take you a second or two but look
8 through these numbers. Do you see any other \$1,500
9 raises?

10 A. No, none. Any 15 -- no, none other at 1,500.
11 Keep going.

12 Q. The next lowest is 2,000, right?

13 A. There's a 2,500 I see and a 2,000.

14 Q. All right. So Professor Mullenix got the
15 lowest raise of anybody?

16 A. Some people didn't get any raise at all.

17 Q. All right. So Professor Mullenix got the
18 lowest raise of the people who got raises?

19 A. It looks that way.

20 Q. All right. So then let's go back to the
21 comments and see why that would be true. So if you go
22 down here to Professor Mullenix, which is line 41, do
23 you see what I'm talking about?

24 A. Uh-huh.

25 Q. It says below average, continued strong

1 teaching but publications were all case notes and
2 updates, no substantial articles.

3 A. Uh-huh.

4 Q. Does that justify in your mind the \$1,500
5 raise?

6 A. I think that that's deserving of a raise for
7 sure because of continued strong teaching. There's
8 nothing said here about the service so I don't know what
9 the service component was. I take it Professor Baker
10 doesn't write quite as much as I tended to write,
11 but. . .

12 Q. Right. So here she's related -- or she's rated
13 below average?

14 A. Which I take it is below baseline is what we --

15 Q. Right, that's what it's saying?

16 A. -- what we use. Yeah, I think that's what it's
17 saying.

18 Q. Now, she also met expectations for the
19 university, correct?

20 A. Right.

21 Q. All right. So why would publications that are
22 all case notes and updates get her a below average
23 rating?

24 A. Well, I think it would be that there wasn't any
25 real scholarship there. There was case notes and

1 updates or -- the updates are more in the nature of
2 service. Case notes are sort of borderline between
3 service and scholarship, depending on how much analysis
4 there is in a case note, but in any event not like a
5 substantial article.

6 Q. Well, I think that's kind of interesting
7 because that's not consistently applied. For example,
8 if you go up to Professor Dickerson, she has continued
9 excellent teaching and she had no scholarship that year,
10 but she was rated average?

11 MR. GIBSON: Objection, misstates the
12 record.

13 Q. (By Mr. Walsh) Does that misstate the record,
14 Professor McGarity, what I just said?

15 A. You said she had excellent teaching and a book
16 contract. Well, that's what it says, book contract with
17 Harvard Press, and average --

18 Q. So what makes --

19 [Simultaneous speaking]

20 A. So it's not the case that -- I mean, she had
21 a -- she had a book that she's working on and that --

22 Q. Well, she has a book contract.

23 A. That's not a publication, but people who are
24 involved in writing books, sometimes in a year where
25 they're working on the book, it may take two years to

1 work on the book, and we would not dock them for that.

2 But yeah, I mean, there aren't any publications in that
3 year.

4 Q. All right. I mean, so why was Professor
5 Mullenix dinged for it but Professor Dickerson wasn't?

6 MR. GIBSON: Objection, misstates prior
7 testimony.

8 A. In Professor Mullenix's it doesn't say anything
9 about a book contract with Harvard University Press or
10 that she's working on a book. Again, that's not a --
11 that's not a huge factor, but --

12 Q. (By Mr. Walsh) Well, so, I mean, if somebody
13 just says they're working on a book --

14 MR. GIBSON: Could you please let the
15 witness finish his answer, please?

16 Q. (By Mr. Walsh) -- why is that better than
17 producing what Professor Mullenix did?

18 MR. GIBSON: Objection, the question
19 interrupted the witness prior to his finishing his
20 answer.

21 A. I don't know that that's the only basis. These
22 are pretty terse notes that Lynn has provided. Neither
23 of them say anything about service, so I don't know how
24 service played out between those two.

25 Q. So here's Professor Dickerson. It says 2017

1 and then she's got a forthcoming Harvard University book
2 but she has nothing reported there.

3 A. Yeah.

4 Q. The year before she's got fairly short works
5 here as well. Do you see?

6 A. They're not fairly short. The Arizona Law
7 Review one is 35 pages, something like that. The other
8 one's more than 30 pages. Those aren't short. They're
9 too --

10 Q. Do you think she was evaluated on her 2016
11 production?

12 A. No, she wouldn't have been into 2017, the
13 evaluation of the 2017 year. We do look -- the reason
14 this is in the binder is we look at the overall flow of
15 publications in deciding whether when somebody says they
16 have something on the way, whether to give it credence I
17 suppose.

18 Q. So now I want to show you Professor Mullenix's
19 publications for 2017 that was considered by Professor
20 Baker in the 2017-2018 budget committee. Here we have
21 mass tort litigation cases and material, a completely
22 revised third edition from something that was originally
23 published in 2018. Would you agree that's significant
24 scholarship?

25 A. Published in 2008.

1 Q. That was the second edition. The third
2 edition --

3 A. It's a modest -- a third edition of a case book
4 is a modest scholarship, but it is scholarship but
5 modest. If it is a brand-new case book --

6 Q. Professor McGarity, how do you know this is
7 modest scholarship?

8 A. Because that's my general assessment. On this
9 particular one I would have to depend on the evaluation
10 of the person who read it, but having read many third or
11 updated editions of case books I can tell you that they
12 rarely reflect a great deal of scholarship.

13 Q. So your knee-jerk reaction, Professor McGarity,
14 is to just discount Professor Mullenix's scholarship?

15 A. Not to discount.

16 MR. GIBSON: Objection, misstates the
17 prior testimony. And I would ask that you not
18 negatively characterize the witness's statements with
19 your own commentary and ask questions, please.

20 MR. WALSH: Objection, sidebar.

21 Q. (By Mr. Walsh) Professor McGarity, you just
22 talked about how Michele Dickerson's failure to do a
23 single publication in 2017 but promised to do a book at
24 some point in the future was worth a lot more than a
25 completely revised third edition of a book that was

1 published nine years ago?

2 MR. GIBSON: Objection, misstates prior
3 testimony.

4 A. I didn't say it was --

5 Q. (By Mr. Walsh) Are you sure you want to stand
6 by that?

7 A. I didn't say it was a lot better. I didn't say
8 it was any better. I just said that it was --

9 Q. Well, what do you think? Is it? Is it at
10 least equal to the promise to do a book in the future?

11 A. It depends on the history of the past
12 publications, but --

13 Q. I'm sorry, you're going to have to explain what
14 that means.

15 A. Well, when we saw Michele's we saw like three
16 articles the year before. You can have a fallow year
17 because of things are tied up in publication or you've
18 got a book you're working on, but it's not as good as
19 having something out there. And Linda did have these
20 case book revisions out there and that takes work and I
21 understand that.

22 Q. Hold on one second.

23 So you're saying that because Professor
24 Dickerson had a few articles the year before, that the
25 fact that she didn't have anything in 2017 was okay?

1 MR. GIBSON: Objection, misstates prior
2 testimony.

3 A. I definitely didn't say it was okay. I said
4 that it, along with other factors like teaching and
5 service, could account for an evaluation of baseline.

6 Q. (By Mr. Walsh) Well, I mean, so she was rated
7 baseline, Professor Mullenix was rated below baseline.
8 Here's Professor Mullenix's 2017 publications that we
9 just talked about. She did another revision to Leading
10 Cases in Civil Procedure; she did a chapter, a
11 completely revised chapter which was 64 pages for A
12 Practitioner's Guide to Class Action Litigation; she did
13 several Moore's Federal Practice and Procedure releases;
14 she did a Jotwell, which you said counted; she did
15 several pre- -- a bunch of previews as well as another
16 Jotwell.

17 And then if you look in 2016 she's got a
18 bunch of stuff as well. So, for example, she's got a
19 Law Review article, she's got a Symposium article, she's
20 got another Law Review article from a class action
21 litigation, and then she's got a preview. So why was
22 this -- why was her history discounted but Dickerson's
23 not?

24 A. I didn't say --

25 MR. GIBSON: Objection, misstates prior

1 testimony.

2 A. I didn't say that her previous was discounted.
3 Had 2017 been a fallow year we would have -- and she
4 said that I've got this book that I'm writing for
5 Harvard University Press, we would have considered the
6 2016. I don't think we needed to consider the 2016 in
7 evaluating Linda in 2017.

8 Q. (By Mr. Walsh) But my question, Professor
9 McGarity, is why was that enough to rate Professor
10 Mullenix below average or below baseline but not enough
11 to rate Professor Dickerson below average?

12 A. As I say, depending on all the factors. I
13 don't have before me the reviews that were given of
14 Professor Mullenix's work. Why -- apparently they
15 weren't reviewed well. I don't know. I did mention
16 that just revising a case book gets you a little credit
17 but not a whole lot of credit and it is more than zero
18 credit. So all I can say is that the committee in its
19 judgment decided that Linda was below baseline that year
20 and that Michele was baseline.

21 Q. Hold on one second. Let me look for something.

22 (Pause.)

23 So here is another person who met
24 expectations, Professor Powe, but he only had a short
25 and okay piece. He does say he's got a book forthcoming

1 in 2018 but he was rated average. What's the difference
2 between Professor Powe and Professor Mullenix?

3 A. With Powe, I can state with even more
4 confidence than with Michele Dickerson that Powe is --
5 he writes big books and so it may take him five or six
6 years to write a big book and during which time he does
7 not have a lot in the way of articles or publications.
8 And the fact that the book was forthcoming in 2018 and
9 he published books in the past, I take it, along with
10 teaching and service, persuaded the committee that he
11 was -- he deserved an above -- a baseline or average
12 raise.

13 Q. So what's a big book? What is considered a big
14 book?

15 A. It's a book with a good academic press. And
16 again, Lynn is very terse here. I probably would have
17 said more if I were summarizing the committee's
18 deliberations. I think this is the book that we spoke
19 of earlier where the dean brought in some folks and they
20 commiserated with Scott about this book he had in mind
21 for Texas, the Texas Constitution I think it was called.
22 One of his big books in the past won the Hamilton Award
23 that I spoke of earlier that won [indiscernible]. So
24 that's I think what probably Lynn was talking about as a
25 shorthand for a major publication with a major

1 publisher.

2 Q. Okay. Well, what about -- let's go back. What
3 about Professor Rabban? He had excellent teaching and
4 he only had a six-page book review. Why was he rated
5 average?

6 A. I'd have to see his forthcoming because I
7 thought he was working on a book.

8 Q. Interesting that you mention that.

9 A. But then I don't. . .

10 Q. Here is David Rabban.

11 A. Okay.

12 Q. And then if you go down to -- here we go.
13 Here's his scholarship. It doesn't list anything
14 forthcoming.

15 A. Some people don't. They don't put in their
16 forthcoming work. So I don't know how we --

17 [Simultaneous speaking]

18 Q. [Indiscernible] excuses here.

19 A. -- how we knew. So I don't know. I would
20 agree with you that a six-page article -- of course, he
21 had very -- he had very high teaching evaluations. I
22 don't know on the service side how they compared, but a
23 six-page book review is not more than revising several
24 case books and treatise work.

25 Q. So would you agree, then, that the standards

1 are inconsistently applied?

2 A. No, I think we try our best to be consistent,
3 and it's conceivable that sometimes we make mistakes but
4 we do the very best we can. We're not perfect.

5 Q. So here Professor Franklin was rated average
6 minus and she had continued excellent teaching but has a
7 lack of service and participation in the intellectual
8 life of the law school. This was also the same year
9 that she was voted to receive the faculty investment
10 initiative funds, right?

11 A. I don't know that for a fact, but I'm willing
12 to accept that it was. I don't remember.

13 Q. So why does she just get average minus when she
14 has excellent teaching but Professor Mullenix has
15 excellent teaching and gets below average?

16 A. Can you show me her scholarship, her form she
17 filled out on scholarship? I don't know whether she
18 submitted forthcoming or not. She's one that produces a
19 blockbuster article every two or three years and she's
20 got forthcoming.

21 Q. But she's got a one-page article in the New
22 York Times for 2017.

23 A. Right, that's not -- that would -- what is it,
24 it's a Jotwell thing. That would account for very
25 little and it didn't even show up on Lynn's thing, but

1 we do have the forthcoming. We also have a strong
2 history of -- well, let's see, going back to 2016 we
3 have a book review, we have the Yale Law Journal. No,
4 that's the Journal for Form so that's -- so I'm not sure
5 why based just on Lynn's terse summary, why one is
6 baseline minus and one is below baseline. I couldn't --

7 Q. Would you agree it seems like the standards are
8 being inconsistently applied?

9 MR. GIBSON: Objection, misstates his
10 testimony.

11 A. I think the standards are being applied as
12 consistently as we can and we're not perfect.

13 Q. (By Mr. Walsh) All right. So now I'll show
14 you what's going to be Exhibit 10. I just put it in the
15 chat. Let me see if I can find it to share. I find
16 this really interesting. So here we go. These are the
17 proposed default raises and the proposed actual raises.
18 So this would be that baseline, above baseline, below
19 baseline thing, right?

20 A. Uh-huh.

21 Q. And so these numbers would be put together by
22 you or Dean Farnsworth, the budget committee or Dean
23 Farnsworth?

24 A. This is Dean Farnsworth. He brings this in to
25 show it to the committee.

1 Q. So the thing that's really interesting here
2 is -- so he brought this in to show and it looks like
3 baseline is \$4,000.

4 A. In that range of the faculty, yes, it does look
5 like that.

6 Q. Why -- so why would like Jordan Steiker get a
7 \$4,500 baseline, Wendy Wagner get a \$4,500 baseline,
8 whereas most of these top earners are only getting 4?

9 A. I'd have to look at their evaluations. It
10 would come out as a baseline plus for them. That's what
11 it looks like.

12 Q. Okay. Well, let's actually -- let me see. We
13 might be able to figure that out right away. So I think
14 I've got it. Are you seeing two screens?

15 A. Well, I'm seeing one screen over the other so
16 I'm not seeing both of them at the same time, but I am
17 seeing two documents.

18 Q. So here we've got Jordan Steiker right here and
19 I have him highlighted in the other one.

20 A. Baseline and --

21 Q. It looks like average and Jordan Steiker here
22 gets a \$4,500 baseline raise.

23 A. Yeah, I don't -- I don't know why that was
24 higher. That's the default rate it said?

25 Q. That's what that looks like to me. Does that

1 look like that to you? That's what they call it.

2 A. Actually I can't remember what we thought --
3 what a default raise was, but I would think it was --
4 you know, that as you see the numbers go, that that
5 4,000 was the baseline. So I don't know why -- I don't
6 know why it came out that way.

7 Q. So here's the one I wanted to talk about,
8 though, is Professor Mullenix. So then the default
9 raise was going to be \$4,000, then the proposed raise
10 was \$3,000. So this is the document that was presented
11 to the budget committee to discuss regarding Professor
12 Mullenix's raise for academic year 2018-2019. But as we
13 already know, that was not the raise that she got.

14 A. Uh-huh.

15 Q. So if we go back to Exhibit No. 9, which I seem
16 to have misplaced, I think you're seeing it. Exhibit
17 No. 9 we know that Professor Mullenix got a \$1,500 raise
18 or half of what Dean Farnsworth proposed.

19 A. Yeah.

20 Q. So what happened there?

21 MR. GIBSON: Objection, misstates prior
22 testimony and misstates the record.

23 A. The answer to your question is I don't know.

24 Q. (By Mr. Walsh) Do you agree that it's strange?

25 A. I'm trying to remember what -- I'm trying to

1 think of a reason for it, and at the moment I can't
2 think of a reason for it.

3 Q. I will maintain to you that it is -- if you
4 took the time you would discover that that is the only
5 one that has been drastically reduced in that manner.

6 A. From the proposal that -- from that final to
7 what actually was paid?

8 Q. Yeah. Let's see, I might be able to -- I might
9 be able to show you both. Let's see if I can do this.

10 A. It says actual raises here in the far right
11 corner.

12 Q. I'm sorry, I'm trying to make this as easy for
13 you to see as possible and I think I might be just
14 messing everything up. There we go. So you did see
15 some reductions for like, for example, Sager was listed
16 at 4,000 but he gets 3,000 here.

17 A. 4,000 would be the -- oh, I see, listed as
18 4,000 --

19 MR. GIBSON: If I could ask the -- if I
20 could ask the witness to wait for his question and then
21 answer the question once he asks you a question.

22 THE WITNESS: Sure.

23 Q. (By Mr. Walsh) Right, so I'm talking about
24 some other reductions that you see. So, for example,
25 Professor Sager, the proposed actual raise was \$4,000

1 but what he actually got once the salary started was a
2 \$3,000 raise. You can see the same thing with like,
3 say, Professor Goode. He was proposed a \$4,000 raise
4 and he got a \$3,000 raise instead. But the only one
5 that's been reduced by half is Professor Mullenix.

6 MR. GIBSON: Is there a question on the
7 table?

8 Q. (By Mr. Walsh) So what would explain that?

9 MR. GIBSON: Objection, asked and
10 answered.

11 A. I don't know.

12 Q. (By Mr. Walsh) I mean, and here's the other
13 thing. So here Professor Weinberg -- if you recall,
14 maybe not -- she was rated as below expectations on
15 Professor Baker's comments sheet and she was proposed
16 for a \$2,000 raise and that is what she got, a \$2,000
17 raise, even though she was below expectations.

18 A. Well, the baseline for her would have been it
19 looks like 4,500, right, so that was much below baseline
20 for her.

21 Q. Well, but it was the same proposed raise is
22 what I'm pointing out here. I'm saying that for the
23 below expectations folks the proposed raise was the same
24 except for Mullenix. And I believe that's true
25 throughout the entire thing.

1 A. I don't know without having looked at all of
2 them.

3 Q. But can you think of a reason that that would
4 have happened in 20- -- for the 2018 pay?

5 MR. GIBSON: Objection, asked and
6 answered.

7 A. I can't recall any reason that would have
8 happened. Not that I can remember.

9 Q. (By Mr. Walsh) Now, after this happened
10 Professor Mullenix came and spoke to you, right?

11 A. She came and spoke to me one of those years in
12 the recent past before COVID, I know it was that,
13 because she came to my office.

14 Q. Okay. You don't think it had to do with this
15 or you don't remember?

16 A. I just don't know. Her question to me when she
17 came into the office was did she deserve to be the
18 lowest paid faculty member.

19 Q. And what did you say to her?

20 A. That I didn't think so.

21 Q. And why didn't you think so?

22 A. Because I thought she should be paid well.

23 Q. Okay. Is this -- does this sound like a
24 question she asked you?

25 A. Let me see. Which one of these questions?

1 Q. Well, all of them.

2 A. I don't think she asked me if I sat on the
3 budget committee. I think she knew that. I don't
4 recall all these questions being answered. I just
5 recall her asking whether she deserved the lowest raise.
6 Oh, there it is, it's question 5. I do recall her
7 asking that question. Did you authorize or instruct,
8 and I said no. I mean, I'm not saying she didn't ask
9 these questions, other than the first one. I'd be
10 surprised if she asked me if I was on the budget
11 committee but she might have.

12 Q. So here's her summary and she wrote this, a
13 summary of what you told her.

14 A. Uh-huh, let's have a look at that.

15 Q. Do you remember telling her these things?

16 A. Let's see. The first paragraph sounds right.
17 Yeah, she certainly would never have wound up in the
18 does not meet expectations category. And apparently I
19 said I'd look into the matter.

20 Q. Did you look into it?

21 A. I can't recall.

22 Q. What would you have done to look into it?

23 A. I would have --

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. I would have looked at the budget committee,
2 the big binder, and I'm not sure what else I would have
3 done.

4 Q. (By Mr. Walsh) What else could you have done?

5 MR. GIBSON: Objection, calls for
6 speculation.

7 A. I don't know. I mean, I could have called a
8 budget committee meeting and if I -- I guess I wasn't
9 the chairman that year so I couldn't have done that. I
10 could have asked for a budget committee meeting or
11 something like that, but I don't think I thought it was
12 worth that.

13 Q. (By Mr. Walsh) So I want to ask you about
14 another page in this document. This is the summary of a
15 discussion Professor Mullenix had with Professor
16 Littwin. So you can see it's the same seven questions
17 for you. It's got handwritten notes underneath.

18 A. Can you make them a little bit bigger?

19 Q. What?

20 A. Can you make them a little bit bigger? Yeah,
21 that's good. A little less than that. There, somewhere
22 about there.

23 Q. Perfect. So what I wanted to ask you about is
24 the second paragraph here where it says, "She,"
25 Professor Littwin, "said the committee took into account

1 the likelihood of a faculty member being lured to
2 another school. She said that at my age the committee
3 decided I was noncompetitive and 120,000" -- I'm sorry,
4 "not likely to get an offer from another law school.
5 She said the law school was under pressure from the
6 provost office to deal with market competitiveness."

7 And then I also want to go down here and
8 say, "Littwin also said that some committee members were
9 put off by my complaining when Michele Dickerson
10 received a teaching award." Do you remember talking
11 about whether or not Professor Mullenix was likely to be
12 lured to another law school?

13 A. No, I don't.

14 Q. Do you remember discussing Professor Mullenix's
15 age?

16 A. No, definitely not.

17 Q. Do you think this is an appropriate thing to
18 talk about in terms of setting salary?

19 A. I think some people think that the possibility
20 that someone would be lured away is a -- or should be a
21 relevant consideration. I do not. I strongly do not
22 feel that way.

23 Q. All right. So you don't remember if this was
24 discussed?

25 A. I don't.

1 Q. Is there any reason to think that Professor
2 Littwin would make that up?

3 A. No, I don't have any reason to think she'd make
4 it up. I don't remember that, but as we've established,
5 sometimes my memory of what happened in the past is not
6 perfect.

7 Q. What about the next area that I talked about,
8 that committee members were put off by Professor
9 Mullenix complaining when Michele Dickerson received a
10 teaching award?

11 MR. GIBSON: Objection, misstates the
12 document. Is there a question?

13 Q. (By Mr. Walsh) Was that discussed?

14 A. I don't recall. At some point I heard that --
15 that Professor Mullenix complained when Michele received
16 a teaching award or that Michele was nominated for the
17 teaching award, but I'm not sure in what context I heard
18 or learned that. I don't think I heard it from Linda.
19 I'm not sure where I heard it. It could have been at a
20 budget committee meeting.

21 Q. Do you think that's an appropriate thing to
22 talk about?

23 A. We do talk about -- when we talk about service,
24 I'm trying to think if we -- we normally don't talk
25 about whether people complain or not, no. I don't

1 consider it personally a consideration that you go into
2 the evaluation for purposes of the budget committee. So
3 if other people did, I would disagree with them.

4 Q. So it doesn't often happen, it doesn't happen
5 that much. So it has happened before, though?

6 A. Has it happened?

7 MR. GIBSON: Objection, calls for
8 speculation.

9 A. What is it you're referring to?

10 Q. (By Mr. Walsh) Discussion of faculty members
11 complaining about other faculty.

12 A. I'm thinking back. I guess I -- I don't know.
13 I don't know if I did this in the budget committee
14 meeting but I think I may have. If I did so -- I'm
15 trying to remember. I complained once about another
16 faculty member. I regret it now but I did.

17 MR. GIBSON: May I ask how long we've been
18 on the record?

19 MR. WALSH: Yeah, actually, let's go ahead
20 and go off the record and take a five-minute break.

21 THE VIDEOGRAPHER: Off the record at
22 5:38 p.m.

23 (Recess taken from 5:39 p.m. to 5:50 p.m.)

24 THE VIDEOGRAPHER: We are back on the
25 record. The time is 5:49 p.m.

1 Q. (By Mr. Walsh) All right. Professor McGarity,
2 you said you remembered two people that you talked about
3 on Friday. Who were they?

4 A. Jane Cohen and Willie Forbath.

5 Q. Were they both baseline?

6 A. I think Willie was baseline but Jane was below
7 baseline.

8 Q. All right. So who sets salaries at U.T. Law?

9 A. Ultimately the dean.

10 Q. Okay. So before the break when we were going
11 through those charts and we saw that the proposed salary
12 for Professor Mullenix was \$3,000 but then the actual
13 salary that she got, the raise that she got was 1,500,
14 does that mean that Dean Farnsworth must have been the
15 one to go in and lower that number?

16 MR. GIBSON: Objection, calls for
17 speculation.

18 A. Yes, unless that reflected a -- that final
19 meeting where he -- that chart you showed me, that's
20 what he presents to the committee. And it could have
21 been that year that someone or more than one person on
22 the committee said they thought that that was too much
23 for Linda and it would have been -- so I don't know that
24 he did it unilaterally. He may have consulted the
25 committee. I just -- I just don't recall.

1 Q. (By Mr. Walsh) Well, you didn't mention that
2 to Professor Mullenix when she came and talked to you
3 about this, though, did you?

4 A. Mention that -- yeah, I didn't mention any --
5 as far as I can recall about what I said to Linda
6 Mullenix --

7 Q. So that would have been the kind of thing --

8 MR. GIBSON: Can you please let him finish
9 answering the question? I'm sorry, could you let him
10 finish answering the question?

11 Q. (By Mr. Walsh) That would have been the kind
12 of thing you would have told her at the time, right?

13 MR. GIBSON: Objection, calls for
14 speculation.

15 A. If I had remembered it at the time.

16 Q. (By Mr. Walsh) Well, your memory would be
17 better at the time than today, right?

18 A. Right.

19 MR. GIBSON: Objection, calls for
20 speculation.

21 A. I think that's generally the case. I do have
22 some stark memories of things that happened long ago
23 that are much better than my memory of what happened
24 last Friday.

25 Q. (By Mr. Walsh) Well, I mean, you did say and

1 you've said repeatedly throughout today and it is
2 confirmed by Exhibit 11, which is up on your screen
3 right now, that you didn't think Professor Mullenix
4 should get the lowest raise.

5 A. That's true, I didn't.

6 Q. And so if somebody at that budget committee --
7 I'm sorry, is that right?

8 A. That is what I recall telling her, yes.

9 Q. And so if somebody at that budget committee had
10 said we should give Professor Mullenix a \$1,500 raise,
11 that probably would have stuck out in your head, right?

12 MR. GIBSON: I apologize, we're having a
13 fire alarm. Hold on a minute. Sorry about that.
14 They're testing the fire alarms. We do not have to
15 leave. You can proceed. Sorry about that, Colin.

16 MR. WALSH: Sure.

17 A. And I missed the question.

18 Q. (By Mr. Walsh) That would have stuck out,
19 right?

20 A. I'm sorry?

21 Q. If somebody said we should give Professor
22 Mullenix the lowest raise, that would have stuck out in
23 your mind?

24 MR. GIBSON: Objection, calls for
25 speculation.

1 A. It might have stuck out in my mind.

2 Q. (By Mr. Walsh) Well, would it surprise you to
3 learn that not a single person mentioned that the budget
4 committee proposed that Professor Mullenix get a \$1,500
5 raise in these charts that I'm now scrolling through?

6 A. No, it wouldn't surprise me.

7 Q. Would it be safe to assume, then, that it's
8 because Dean Farnsworth is the one who ultimately
9 lowered it to \$1,500?

10 MR. GIBSON: Objection, calls for
11 speculation.

12 A. I wouldn't necessarily assume that. It may be
13 that none of us remembered that meeting that well.

14 Q. (By Mr. Walsh) Well, it does seem like the
15 budget committee has a lot of trouble remembering.
16 You're not the only person who doesn't seem to remember
17 budget committees days after they happened.

18 MR. GIBSON: Is that a question?

19 Q. (By Mr. Walsh) Is it something in the water?

20 A. I'm sorry?

21 Q. Is it something in the water?

22 A. I don't know even that it's a something.

23 Q. Yeah. I mean, I have a theory, but I --

24 [Fire alarm interruption]

25 So Dean Sager gave a whole bunch of

1 forgivable loans to professors, correct?

2 MR. GIBSON: Objection, mischaracterizes
3 the record. Can you hold on just a second? I'm sorry,
4 we'll give you a couple of minutes, add them back.
5 Sorry.

6 [Fire alarm interruption]

7 MR. GIBSON: Okay, it appears to be over
8 for now.

9 Q. (By Mr. Walsh) All right. So Dean Sager gave
10 a bunch of forgivable loans to law professors, correct?

11 A. That's my understanding, yes.

12 Q. All right. Well, I mean, you were on the
13 budget committee. You don't know about that?

14 A. I certainly didn't.

15 Q. Well, I mean, the reason I'm asking is because
16 all that stuff got amortized after Dean Sager left,
17 right?

18 A. Yes. After the fact I learned about it, yes.

19 Q. So you did know that he did that. Do you also
20 know that Professor Mullenix has a settlement with Dean
21 Sager?

22 A. I knew that there was a settlement. I guess it
23 was during Dean Sager's years, yes.

24 Q. Do you know what that settlement was for?

25 A. My understanding was because of a lawsuit that

1 was either pending or threatened or something along
2 those lines.

3 Q. All right. And so these forgivable loans that
4 Dean Sager provided to these professors, they were not
5 in settlement of any claims, correct?

6 MR. GIBSON: Objection, calls for
7 speculation.

8 A. My answer is I don't know.

9 MR. WALSH: What a delightful fire alarm.

10 THE WITNESS: I don't know if you're
11 hearing this, but I think we're done now. I think he
12 said testing is complete now.

13 A. And I'm sorry, I'm going to have to ask you to
14 ask the question again.

15 Q. (By Mr. Walsh) So were any of the forgivable
16 loans that Dean Sager gave to other professors to settle
17 claims?

18 A. Not to my knowledge.

19 Q. Okay. So then you would agree that the
20 forgivable loan given to Professor Mullenix in
21 settlement of her claims is different than the
22 forgivable loans given to the other professors?

23 MR. GIBSON: Objection, calls for
24 speculation.

25 A. It sounds like it.

1 Q. (By Mr. Walsh) So then why -- so why is
2 Professor Mullenix's settlement amortized?

3 A. I have no idea.

4 Q. Well, you were on the budget committee when it
5 was decided to do that.

6 A. I did not -- the committee never decided to
7 amortize. As far as I know, the committee didn't make
8 that decision.

9 Q. Are you sure that that's going to be your
10 testimony, that the committee did not make that
11 determination?

12 A. We decided to amortize the forgivable loans.
13 If her settlement was characterized as a forgivable
14 loan, then we decided to amortize it, but I don't know
15 that --

16 Q. Why not treat her settlement differently since
17 it's not the same?

18 A. I guess my question would be why treat it
19 differently.

20 Q. Well, because it's not the same because it's
21 different. It's settling a discrimination claim as
22 opposed to just a bonus for coming to work at U.T.

23 MR. GIBSON: What's your question?

24 Q. (By Mr. Walsh) So why not treat it
25 differently?

1 MR. GIBSON: Objection, asked and
2 answered.

3 A. Why not treat it differently? I just don't
4 know. I don't think the budget committee made any
5 decision about Linda Mullenix's forgivable loan per se
6 as Linda Mullenix's. I think we made a decision with
7 respect to forgivable loans.

8 Q. (By Mr. Walsh) Did Professor Peroni ever
9 object to amortizing Professor Mullenix's settlement?

10 A. I don't recall him ever objecting.

11 Q. Did Dean Farnsworth ever tell the budget
12 committee that Professor Mullenix objected to her
13 settlement being amortized?

14 A. Not to my recollection.

15 Q. Has Dean Farnsworth ever asked you who to
16 nominate for teaching awards?

17 A. Asked the committee or me personally?

18 Q. Both. First you personally.

19 A. Me personally, not that I can recall. And I
20 can't recall him asking the budget committee about that.
21 I mean, he nominated me for a teaching award and he
22 consulted with me about that. He probably asked if I
23 wanted to be nominated, so I guess with respect to me he
24 asked me personally.

25 Q. But he never asked you if you would recommend

1 anyone else?

2 A. No. I think there's a committee that does --
3 for the Massey Award there's a committee that does that.
4 With respect to the university teaching award, there's a
5 big university teaching award which he nominated me for
6 but I didn't get. He consulted me, but he's not
7 consulted me about nominating somebody else.

8 Q. All right. So I've asked a bunch of questions
9 and I know that your counsel will think that I talked
10 over you and stopped you from answering some of them.
11 Are there any of my questions that you'd like to add to
12 your answers on?

13 A. Not at the moment. No, I can't think of
14 anything.

15 Q. Is there anything that you think I should know
16 or wish I had asked during this deposition?

17 A. Not that I can think of at the moment.

18 MR. WALSH: All right. Pass the witness.

19 EXAMINATION

20 BY MR. GIBSON:

21 Q. Professor McGarity, I just have a few
22 questions. First off, during the course of your
23 testimony you referred to the faculty development
24 initiative or other terms referring to what I think you
25 meant to refer to the faculty investment initiative.

1 Does that sound correct?

2 A. Yes, that does sound correct.

3 Q. So when you refer to the faculty development
4 initiative or other similar terms, were you intending to
5 refer to the faculty investment initiative?

6 A. Yes.

7 Q. There was some prior testimony regarding
8 whether or not the budget committee affects -- or
9 whether or not the budget committee deliberations
10 affects pay raises for those who receive the faculty
11 investment initiative. Do you recall that testimony?

12 A. Yes.

13 Q. Is it true that certain individuals who
14 received an initial faculty investment initiative then
15 received a second amount of faculty investment
16 initiative in the second round? Is that correct?

17 A. Yes, that's correct.

18 Q. And did the budget committee make those
19 recommendations to the dean?

20 A. Yes, that was part of our recommendation.

21 Q. In some of the charts we saw some of those
22 individuals were identified as receiving, for example,
23 \$12,000 raises or \$13,000 raises per year. Is that
24 correct?

25 A. I think that's right.

1 Q. And those individuals would be individuals who
2 received both the first round of the FII as well as a
3 supplemental second round?

4 A. Yeah, I think that's correct.

5 Q. If you could, I'm going to pull up Exhibit
6 No. 10 that was used today and ask you just a few
7 questions about that. Do you see Exhibit No. 10 on the
8 screen which at the top left-hand corner is labeled
9 Exhibit 10 D-36840?

10 A. Exhibit 3, yes, I see that.

11 Q. I'm sorry, at the very top left-hand of the
12 screen you should see --

13 A. Oh, way up there. Exhibit 10 D, yeah, I see
14 it.

15 Q. I just want to make sure for the record we're
16 all on the same page here.

17 A. Yes.

18 Q. This document lists all the tenured -- tenure
19 track professors, correct?

20 A. I think that's right.

21 Q. And we see that the first -- the first group of
22 individuals who have a -- what's called the default
23 raises, those equal \$4,000. Is that correct?

24 A. That's correct.

25 Q. And then there start to be people in the list

1 that have default raises of \$4,500, correct?

2 A. Yes, I see that.

3 Q. Then we see many of those individuals in the
4 list. I'm going to go down this list. Correct?

5 A. That's correct.

6 Q. And then we start to see individuals with a
7 default raise of \$5,000. Is that correct?

8 A. That's correct.

9 Q. And we see many of those individuals. Is that
10 correct?

11 A. That's correct.

12 Q. And then we start to see individuals with a
13 default raise of \$5,500. Is that correct?

14 A. That's correct.

15 Q. And we see many of those individuals with
16 raises of \$5,500 in the default raise column. Is that
17 correct?

18 A. That's correct.

19 Q. Is this consistent with your prior testimony
20 that there are approximately three to four cohorts of
21 individuals for whom the default raise is the same for
22 that cohort?

23 A. Yes, I think I said three, but it looks now
24 from looking at this like it's four.

25 Q. And is that also consistent with your prior

1 testimony that the faculty members who are paid the
2 highest generally have the lowest default raises and
3 those that are paid the lowest generally have the
4 highest default raises?

5 A. I think in general that's the case, yes.

6 Q. And then if you look at the next right-hand
7 column, the column that says actual raises, many of
8 those individuals have amounts that are \$10,000 or over.
9 Is it your recollection that for most of those
10 individuals, that reflects that those individuals had
11 previously been awarded faculty investment awards?

12 A. Yes, I think that's what accounts for that.

13 Q. And do you -- for those individuals who are in
14 the default raise of \$4,000, does that appear to be the
15 cohort in which Professor Mullenix is in? And I'll
16 highlight Professor Mullenix. Does that appear that
17 she --

18 A. Yes, it does appear to be that cohort.

19 Q. And that is the cohort of the highest or the
20 most senior faculty. Is that correct?

21 A. I think that's right, yes.

22 Q. And --

23 A. Well, you've got Abe Wickelgren there, so it
24 may have more to do with pay than seniority.

25 Q. So going to Professor Mullenix, do you know if

1 she -- if anyone else in her cohort was described as
2 below baseline or below average in the chart we looked
3 at before?

4 A. I just don't recall.

5 Q. Do you know if anyone else in her cohort
6 received -- let me just pull that up very quickly. And
7 does it appear that you are looking at Exhibit 8? At
8 the very top of your screen does it say Exhibit 8, at
9 the very, very top in the green bar? Maybe I can make
10 it a little smaller.

11 A. Oh, I see it now. Yes, sir, Exhibit 8, it's in
12 the middle now. Yes, I see it.

13 Q. Exhibit 8, document number 36733. Is that
14 correct?

15 A. That is correct.

16 Q. Let me try and make this a little bigger so we
17 can --

18 A. That's big enough. I can. . .

19 Q. Okay. What I'm going to do is I'm going to
20 filter on this document so we can just see just those
21 individuals who received a below baseline or below
22 average. So I'm going to turn on the filter for below
23 average or average minus. Okay?

24 A. Okay.

25 Q. So for those in -- do you see anyone here --

1 let me -- I did this a second ago. Hold on just a
2 second. Oh, we were going to look at the other chart.
3 Never mind. We can look at -- the other chart has the
4 actual raises they received, and I will admit it's a
5 little bit complicated to try to put the charts next to
6 each other. But I will say let's just go to one person.
7 Do you see Hersel Perry on this chart, he's marked below
8 average?

9 A. Yes.

10 Q. Okay. And you see Michael Churgin. Is he also
11 marked below average?

12 A. Yes.

13 Q. And I'm going to go -- these are just two
14 examples of individuals who are marked below average.
15 Is Lino Graglia, is he also marked below average on
16 here?

17 A. Yes.

18 Q. Is that a male?

19 A. Yes.

20 Q. I'm going to stop that screen and then shift
21 quickly to this document. This is the list of actual
22 raises that individuals received that year that we
23 looked at previously. Are you seeing what's marked as
24 Exhibit 9 at the top?

25 A. Yes. I see Exhibit 9, yes.

1 Q. And you see that Hersel Perry got a zero raise
2 that year. Is that correct? You see at the bottom of
3 that page?

4 A. Oh, way down there, yeah. I see it, yes.
5 Zero, yes.

6 Q. He actually received less than Linda Mullenix.
7 Is that correct?

8 A. That is correct.

9 Q. You see Michael Churgin also received a zero
10 raise?

11 A. Yes.

12 Q. And you also see Lino Graglia also received a
13 zero raise. Is that correct?

14 A. That is correct.

15 MR. GIBSON: No further questions at this
16 time.

17 MR. WALSH: I have no further questions at
18 this time either. We'll reserve our questions for
19 trial. I will note your memory got better when
20 Mr. Gibson was questioning you, but that's it.

21 MR. GIBSON: We'd like to read and sign,
22 please.

23 THE REPORTER: Thank you. And Darren, do
24 you know if you-all have a standard order with us or
25 preferences on file or would you like to state that now

1 since we're doing this remotely?

2 MR. GIBSON: If you could call my
3 assistant, probably better than if I screwed up.

4 THE REPORTER: Okay, got it. Thank
5 you-all.

6 MR. GIBSON: Thank you.

7 THE VIDEOGRAPHER: Off the record at
8 6:12 p.m.

9 (Deposition concluded at 6:13 p.m.)

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1 CHANGES AND CORRECTIONS

2 DEPONENT: THOMAS O. MCGARITY DATE: MAY 3, 2021

3 Reason Codes: (1) to clarify the record; (2) to conform
4 to the facts; (3) to correct a transcription error; (4)
5 other (please explain).

6 PAGE LINE CHANGE REASON CODE

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15 _____

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1 SIGNATURE

2

3 I, THOMAS O. MCGARITY, have read the foregoing
4 deposition and hereby affix my signature that same is
5 true and correct, except as noted on the previous page.

6

7

THOMAS O. MCGARITY

8

9 STATE OF _____

10 COUNTY OF _____

11 Before me, _____, on this day
12 personally appeared THOMAS O. MCGARITY, known to me (or
13 proved to me under oath or through _____)
14 (description of identity card or other document) to be
15 the person whose name is subscribed to the foregoing
16 instrument and acknowledged to me that they executed the
17 same for the purposes and consideration therein
18 expressed.

19 Given under my hand and seal of office this
20 _____ day of _____, 2021.

21

22

23

NOTARY PUBLIC IN AND FOR
THE STATE OF _____

24

25

COMMISSION EXPIRES: _____

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Defendant.

Civil No. 1:19-cv-1203-LY

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1 () was waived by the deponent and/or
2 attorneys at the completion of the deposition;

3 That the amount of time used by each party at
4 the deposition is as follows:

5 Mr. Colin Walsh - 6 hours, 54 minutes
6 Mr. Darren Gibson - 9 minutes

7 That \$_____ is the deposition officer's
8 charges to the Plaintiff for preparing the original
9 deposition transcript and any copies of exhibits;

10 I further certify that I am neither counsel
11 for, related to, nor employed by any party in this
12 cause, and further that I am not financially or
13 otherwise interested in the outcome of the action.

14

15 Certified to by me this 19th day of May, 2021.

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CYNTHIA WARREN, Texas CSR 4597
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